92-96

Supreme Court, U.S.
FILED
JUL 7 1992
OFFICE OF THE CLERK

NO. _____

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

PATRICIA A. MERTENS — PETITIONER

V.

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually and in his official capacity; HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, and in his official capacity; THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity; FRANK WILLEY (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity — RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

WILLIAM C. JACOBS
Petitioner's Counsel of Record
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2464
(606) 254-9086

QUESTIONS PRESENTED FOR REVIEW

1. Must a state court apply its settled notice pleading principles to a 42 U.S.C. §1983 complaint, when deciding a motion to dismiss for failure to state a claim, in order to avoid discriminating against the federal claim in violation of the Supremacy Clause, where the §1983 complaint would have been sufficient under those settled principles, but the application of a theretofore unrecognized heightened pleading requirement operated to defeat the §1983 claim?

2. Is there an inherent heightened pleading requirement which a §1983 complaint must meet in order to withstand a motion to dismiss for failure to state a claim, where qualified immunity is not implicated in the motion?

3. Where a state court dismisses a §1983 patronage discharge claim grounded on the conclusion that the employee's former office was "policy-making," does it impermissibly discriminate against the claim, contrary to the Supremacy Clause, as well as err, where the complaint was premised on the rule of Branti v. Finkel[1] that the sole defense to the patronage discharge of a public employee satisfactorily performing the job is that political affiliation is an appropriate requirement for the effective performance of the office, where the state's settled notice pleading principles are that the allegations of the complaint are to be taken as true and construed most favorably to the plaintiff?

4. Where a state court §1983 complaint contained fact-specific allegations of *Branti v. Finkel* principles, and sought damages and injunctive relief for a patronage discharge, may the state court, consistent with the Supremacy Clause, dismiss the

---

[1] 445 U.S. 507, 63 L.Ed.2d 574, 100 S.Ct. 1287 (1980)

complaint for failure to state a claim, without leave to amend, based upon a heightened pleading requirement for §1983 actions theretofore unrecognized by the state, in the face of the state's settled notice pleading principles that (1) the complaint should not be dismissed unless it appears that the plaintiff would not be entitled to relief under any set of facts which could be proven in support of the claim, and (2) the allegations of the complaint are to be taken as true, construed in the light most favorable to the plaintiff, and may be in the form of conclusions so long as there is notice of the claim?

5. Is a §1983 complaint for a patronage discharge conclusory, and thereby deficient to withstand a motion to dismiss for failure to state a claim, wherein it is alleged that the plaintiff satisfactorily performed her job, that she was affiliated with a different faction of the Democratic party from that of the newly elected governor, that she was terminated pursuant to the custom of the state whereby unclassified state employees not aligned with the newly elected governor are discharged and replaced by such governor's political allies, and that the sole reason for, or a substantial or motivating factor for her discharge was her political beliefs?

PARTIES

The caption of the case in this Court contains the names of all parties.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
PARTIES iii
TABLE OF AUTHORITIES vi
OPINIONS BELOW viii
JURISDICTION viii
U. S. CONSTITUTIONAL PROVISIONS INVOLVED ... ix
STATUTE INVOLVED x
STATEMENT OF THE CASE 1
How The Federal Questions Sought
To Be Reviewed Were Raised. 2
REASONS FOR GRANTING THE WRIT 13
Question Nos. 1, 3 and 4 13
Question No. 2 15
Question No. 5 17
Other Reasons for the Granting the Writ. 18
CONCLUSION 20
APPENDIX:
Opinion of Kentucky Supreme Court
(decision sought to be reviewed). 1a
Opinion of Kentucky Court of Appeals 7a
Dissent, McDonald, J., Kentucky Court of Appeals 19a
Order, Franklin Circuit Court. 22a
Final Order and Opinion, Franklin Circuit Court. 23a
Order denying Petition for Rehearing,
Kentucky Supreme Court. 27a
Original Complaint 28a
Amended Complaint. 34a

TABLE OF AUTHORITIES

Cases:

Board of Trustees of the U. of K. v. Hayse, Ky., 782 S.W.2d 609 (1989) 14

Branti v. Finkel, 445 U.S. 507, 63 L.Ed.2d 574, 100 S.Ct. 1287 (1980) ..... i, 3, 7, 8, 10, 13, 15

District Council 47, American Federation of State, County and Municipal Employees, AFL-CIO v. Bradley, 795 F.2d 310 (3d Cir., 1986) 18, 20

Elrod v. Burns, 427 U.S. 347 (1976) 8, 15

Ewell v. Central City, Ky., 340 S.W.2d 479 (1960) 10

Felder v. Casey, 487 U.S. 131, 101 L.Ed.2d 123, 108 S.Ct. 2302 (1988) 4

Gall v. Scroggy, Ky.App., 725 S.W.2d 867 (1987) 3, 8, 10

Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980) 14

Gutierrez v. Municipal Court of Southeast Judicial District, 838 F.2d 103 (9th Cir., 1988) 11

Harlow v. Fitzgerald, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982) 16

Hobson v. Wilson,
737 F.2d 1 (D.C. Cir. 1984) 11, 16, 19
Howlett v. Rose,
496 U.S. ___, 110 L.Ed.2d 332, 110 S.Ct. ____ (1990) . 12, 14
Kentucky v. Graham,
473 U.S. 159, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985) 4
Maine v. Thiboutot,
448 U.S. 1, 65 L.Ed.2d 555, 100 S.Ct. 2502 (1980) 14
Mt. Healthy City School
District v. Doyle,
429 U.S. 274 (1977) 8
Parratt v. Taylor,
441 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1098 (1981) 4
Perry v. Sindermann,
408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972) 4, 8
Pierson Trapp Company v. Peak,
Ky., 340 S.W.2d 456 (1960) 10, 17
Poe v. Hayden,
853 F.2d 418 (6th Cir., 1988) 11
Siegert v. Gilley,
500 U.S. ___, 114 L.Ed.2d 277, 111 S.Ct. ___ (1991) 20
Testa v. Katt,
330 U.S. 386, 91 L.Ed.2d 967, 67 S.Ct. 810 (1947) 13, 15, 19
Upchurch v. Clinton County,
Ky., 330 S.W.2d 428 (1959) 9

U. S. Constitutional Provision:

First Amendment ..... viii, ix
Fourteenth Amendment ..... viii, ix

U. S. Statutes:

28 U.S.C. §1257 viii
42 U.S.C. §1983 ..... i, ii, vii, x, 1
42 U.S.C. §1988 2

Federal Rules of Civil Procedure:

12(b)(6) 2, 18

Kentucky Rules of Civil Procedure:

8.01 9
8.01(1) 3
12.02(f) 3, 8-10, 14
15.01 20

OPINIONS BELOW

The Opinion of the Kentucky Supreme Court, rendered January 16, 1992, is unreported. (Appx. 1a-6a).

The Opinion of the Kentucky Court of Appeals rendered September 7, 1990, is unreported. (Appx. 7a-21a).

The Opinion of the Franklin Circuit Court, dated July 5, 1989, (Appx. 23a-26a) is unreported.

JURISDICTION

The Kentucky Supreme Court issued its opinion on January 16, 1992. The order denying the Petition for Rehearing was entered on April 9, 1992. This Petition is filed within 90 days after the entry of the order denying Respondent's Petition for Rehearing.

The ground on which the jurisdiction of this Court is invoked is that the final judgment, rendered by the highest court in the State of Kentucky in which a decision could be had, is reviewable by this Court by writ of certiorari where any right set forth is specifically claimed under the statutes of the United States.

Petitioner claims redress for the deprivation of 1st and 14th Amendment rights pursuant to 42 U.S.C. §1983 by a reason of the patronage discharge of her from her unclassified employment with the Commonwealth of Kentucky.

The jurisdiction of this Court to review the opinion and judgment of the Kentucky Supreme Court is invoked pursuant to 28 U.S.C. §1257.

U. S. CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE VI

Assumption of public debt; Supreme law; Oath of office; Religious test prohibited. . . . .

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding. . . . .

FIRST AMENDMENT

Freedom of religion, speech and press; rights of assembly and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT

Section 1. ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On January 20, 1989, Patricia A. Mertens ("Mertens") filed her verified Complaint under 42 U.S.C. §1983 in the Franklin Circuit Court of the Commonwealth of Kentucky, against the Respondents, sometimes collectively referred to as "Respondents." By her original Complaint (Appx. 28a-33a), she alleged, inter alia:

(a) that she became employed as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky on April 1, 1987;

(b) that she satisfactorily performed her job as Director of the Division of Child Support Enforcement until on or about January 29, 1988, when, without cause, Respondents discharged her from her employment;

(c) that at all times pertinent, Wilkinson was the head of a faction of the Democratic Party of the Commonwealth of Kentucky;

(d) that neither during the gubernatorial primary nor during the gubernatorial election of 1987 did she support the faction of the party of which Wilkinson is and was the head;

(e) that neither Democratic Party affiliation nor affiliation with the faction of the Democratic party of which Wilkinson is the head is an important requirement for the effective performance of the office of Director of Child Support Enforcement;

(f) that on or about February 15, 1988, Respondents caused the position formerly held by Mertens to be filled by a member of the faction of the Democratic Party of which Wilkinson was and is the head;

(g) that a substantial or motivating factor for the discharge of Mertens by Respondents or the sole reason for the discharge of Mertens by Respondents was her political beliefs;

(h) that a substantial or motivating factor for her discharge by Respondents or the sole reason for the discharge of her by Respondents was the political beliefs of her replacement;

(i) that her discharge by Respondents subjected her or caused her to be subjected to the deprivation of rights, privileges or immunities secured to her by the U.S. Constitution under color of statute, regulation custom or usage of the Commonwealth of Kentucky;

(j) that the 1st and 14th Amendments to the U.S. Constitution secured to her certain rights, privileges or immunities, including the protection against discharge from her employment because of her political beliefs.

Mertens alleged that by reason of the impermissible conduct of the Respondents she lost earnings, suffered embarrassment, humiliation, mental and emotional distress for which she sought compensatory damages. In addition, Mertens sought to recover punitive damages of Respondents, Wilkinson and Cowherd.

Mertens also sought the injunctive relief of reinstatement to her former employment at the level of compensation, including benefits, she would have been earning but for the impermissible conduct of the Respondents, or in the alternative, front pay. She also sought her costs, including a reasonable attorney's fee under 42 U.S.C. §1988.

How The Federal Questions Sought To Be Reviewed Were Raised.

Mertens' Complaint was met with a motion to dismiss for failure to state a claim under Kentucky Civil Rule 12.02(f), Kentucky's equivalent of F.R.Civ.P. 12(b)(6).[2] Respondents' supporting memorandum asserted the following grounds for

---

[2] Respondent's dismissal motion also asserted common law sovereign immunity as a bar.

dismissal: (a) Mertens had no property interest in her public employment; (b) Mertens failed to exhaust administrative remedies and Mertens had adequate post-deprivation remedies, and (c) the Complaint did not satisfy a heightened pleading requirement applicable to §1983 actions.

Respondents relied solely on federal authorities with respect to the heightened-pleading-requirement ground which, with few exceptions, were cases addressing the defense of qualified immunity. Their dismissal motion was not premised on the qualified immunity defense.

With respect to the heightened pleading requirement issue, Mertens relied on *Gall v. Scroggy*, Ky.App., 725 S.W.2d 867 (1987), which held that it was well settled in Kentucky that the pleadings should be construed liberally in a light most favorable to the plaintiff and all allegations in the complaint are to be taken as true when the court is considering a KCR 12.02(f) motion. KCR 8.01(1) provides:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (a) a short and plain statement of the claim showing that the pleader is entitled to relief and (b) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Mertens also cited and furnished the trial court a copy of the majority opinion in ***Branti v. Finkel***, 445 U.S. 507, 63 L.Ed.2d 574, 100 S.Ct. 1287 (1980), a case not mentioned in the Respondents' motion.

Branti holds, Mertens pointed out in her Response Memorandum, "that discharge of a public employee solely because of the employee's political beliefs, where political affiliation is not an important requirement for the effective

performance of that position, and the employee had satisfactorily performed the job is violative of the 1st and 14th Amendments." The issues not directly pertinent to this Petition were addressed by the parties as noted below.[3]

After an oral argument on Respondents' motion to dismiss, the trial court granted the motion and by its order entered March 29, 1989 (Appx. 22a) gave Mertens "10 days in which to amend her complaint to state non-conclusory allegations of evidence of unconstitutional motive or intent."

Mertens timely filed her Amended Complaint (Appx. 34a-41a). which alleged, inter alia:

> That the termination of Plaintiff in her employment as Director of Child Support Enforcement was pursuant to the custom of the Commonwealth of Kentucky, constitutionally impermissible under the 1st and 14th Amendments to the U.S. Constitution, whereby unclassified state employees who were not politically allied with the newly elected Governor or his political supporters during the primary or general

---

[3] Mertens relied on *Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972), as her authority that the absence of a property interest in her employment with the state was irrelevant to her §1983 claim brought under the 1st Amendment. Respondents relied on *Parratt v. Taylor*, 441 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1098 (1981), as the authority that Mertens' claim must fail because of the adequacy of post-deprivation remedies. Mertens pointed out that *Parratt* had applicability only to claims implicating 14th Amendment procedural due process, and was thus inapplicable to Mertens' patronage discharge claim under the 1st Amendment.

Mertens relied on *Felder v. Casey*, 487 U.S. 131, 101 L.Ed.2d 123, 108 S.Ct. 2302 (1988), as her authority that administrative remedies need not be exhausted before a §1983 action may be brought in state court.

Mertens relied on *Kentucky v. Graham*, 473 U.S. 159, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985), *Felder* and the Supremacy Clause as her authority that common law sovereign immunity was no defense to a §1983 action in state court against the Respondents sued in their individual capacities.

election are discharged by the newly elected Governor for the purpose of replacing such unclassified state employees with persons who were politically allied with the newly elected Governor or his political supporters during the primary or general election, all without regard to whether political affiliation with the newly elected Governor is an important requirement for the effective performance of the employment from which such unclassified state employee is discharged. (Appx. 35a).

The Amended Complaint also alleged that Mertens was demonstrably affiliated with a faction of the Kentucky Democratic party which was not aligned with the faction of which the newly elected Governor was the head; that the newly elected Governor had campaigned against a major and much publicized action of the Governor who headed the faction of the Kentucky Democratic party with which Mertens was aligned.

Mertens' Amended Complaint detailed the nature of the Division of Child Support Enforcement as being tightly regulated by federal law and regulation, and alleged that she was replaced by a political ally of the Fayette County attorney, a person enjoying significant influence on political patronage for the administration of the Respondent Governor. Mertens alleged that contemporaneous with Mertens' termination, effective January 29, 1988, by letter dated January 22, 1988,[4] Mertens was complimented by her immediate superior for her

---

[4] The body of the January 22, 1988 letter in its entirety was:

> Your services as Director of the Division for Child Support Enforcement in the Department of Social Insurance will no longer be needed after the close of business on January 29, 1988.
>
> Consequently, you will be terminated on that date.

job performance as Director of Child Support Enforcement. Mertens' entire Amended Complaint is Appx. 34a-41a hereto.

The trial court by written opinion (Appx. 23a-26a) dismissed the Complaint, as amended, and Mertens timely appealed. The pertinent rulings[5] of trial court and the Kentucky Court of Appeals were as follows:

---

[5] The rulings of the trial court and the Court of Appeals, not directly pertinent to the question of a heightened pleading requirement for §1983 actions were, as follows:

(1) The trial court decided that Mertens had no property interest in her unclassified employment protected by the 14th Amendment. (Appx. 24a).

The Court of Appeals agreed with the trial court (Appx. 15a) holding that Mertens had no property interest in her employment protectable by the Due Process Clause of the 14th Amendment (Mertens never claimed that she did). In addition, the Court of Appeals held (Appx. 16a) that the discharge did not deprive Mertens of any liberty interest under the Due Process Clause of the 14th Amendment (except to the extent that the 1st Amendment is applicable to the states through the 14th Amendment, Mertens did not claim that it did).

(2) The trial court ruled that Mertens did not exhaust administrative remedies before bringing her §1983 action. (Appx. 24a-25a).

The Court of Appeals disagreed with the trial court holding that there were no administrative remedies available to Mertens which required exhaustion prior to commencing this §1983 action. (Appx. 11a-12a).

(3) The trial court dismissed the Complaint on the ground that Mertens was asserting federal constitutional rights in state court and, having failed to show a property interest protected by the 14th Amendment, she failed to state a claim for §1983 protection in the state court. (Appx. 24a).

The trial court also ruled that no recovery could be had against Wilkinson and Cowherd, individually, on her §1983 claim because Mertens had "made no showing" that those Defendants acted "unlawfully" or "in excess of their legal authority." All other §1983 claims, according to the trial court, were barred by sovereign immunity. Although Mertens made no negligence claim against Defendants, the trial court made an irrelevant ruling against Mertens pertaining to negligence. (Appx. 26a).

The Court of Appeals disagreed, holding that this §1983 action may be brought in state court, and that the §1983 claims (for damages) against Wilkinson and Cowherd, individually, and against all Defendants for injunctive relief were properly brought. (Appx. 9a-11a).

(1) The trial court ruled that a claim for relief must be stated in terms of facts rather than conclusions (Appx. 25a), and that Mertens had not met the trial court's heightened pleading requirements in order to state a claim. (Appx. 26a).

The Court of Appeals held that there is a heightened pleading requirement for §1983 actions filed in Kentucky's courts, (Appx. 13a), notwithstanding the Kentucky authorities to the contrary with respect to all other cases filed in Kentucky's courts, (Appx. 12a-13a), and that Mertens' §1983 Complaint and Amended Complaint did not satisfy that heightened pleading requirement. (Appx. 12a).

(2) The trial court ruled that *Branti v. Finkel*, *supra*, is distinguishable from Mertens' §1983 action, because the plaintiffs in *Branti* "made a showing" that they were discharged for their political beliefs, and "made a showing" that they were not in policy making positions, while Mertens had only *alleged* that she was discharged for her political beliefs, and had only *alleged* that her former position was not a policy making position. (Appx. 25a).

The Court of Appeals substantially agreed with the trial court and such agreement formed the basis upon which the Court of Appeals affirmed. In affirming, the Court of Appeals held that Mertens failed to meet "her burden of showing that the appellees infringed upon her First Amendment rights" (Appx. 18a), nor did she assert any conduct, speech or belief that was constitutionally protected, "nor has she shown that the appellees decided to dismiss her because of any such conduct." (Appx. 18a).

The Court of Appeals further held that the "General Assembly apparently intended her job to be considered as a policymaking position" (Appx. 18a). Continuing its agreement with the trial court that there is a "showing" requirement at the

KCR 12.02(f) stage, the Court of Appeals held that because Mertens had "not adequately shown by facts what activities or conduct she undertook that would have been protected speech nor . . . shown the intent of the appellees to deprive her of this right," (Appx. 18a), this case is distinguishable from *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, supra. The Court of Appeals observed that Mertens "was a member of the Democratic party and her replacement was a Democrat." (Appx. 18a).

In addition, the Court of Appeals held that because the claimants in *Perry v. Sindermann*, *supra*, and *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977) "were able to factually show constitutionally protected conduct that the employer used to retaliate against the employee" (Appx. 18a-19a), this case was distinguishable.

Until this case, there had never been a "showing" requirement under Kentucky's settled notice pleading principles. The allegations of the complaint have always been taken as true on a KCR 12.02(f) motion to dismiss for failure to state a claim. See, *Gall v. Scroggy*, *supra*.

Mertens sought and was granted discretionary review by the Kentucky Supreme Court of the following questions of law (verbatim):

1. Does the §1983 complaint state a claim for the violation of Mertens' 1st Amendment rights for which relief may be granted if it alleged, inter alia, that Kentucky has a de facto one-party system in gubernatorial elections, the factionalized Democratic Party; that neither during the primary nor general election did Mertens support the faction of the Democratic party of which the Governor was the head; that affiliation with that faction of the Democratic party was not an important requirement for the effective performance of her job; that she satisfactorily

performed her job; that she was discharged without cause by the newly-inaugurated Governor, under color of Kentucky's custom of discharging non-classified employees who did not support the elected administration; and that a substantial or motivating factor or the sole reason for her discharge was her political beliefs and/or the political beliefs of her replacement?

2. Is there a different (heightened) pleading requirement applicable to complaints in §1983 actions which is not applicable to all other complaints under CR 8.01 in order for the complaint to withstand a motion to dismiss for failure to state a claim under CR 12.02(f).

3. If there is a such a heightened pleading requirement for complaints in §1983 actions which is not otherwise applicable to other complaints under CR 8.01, did Mertens' complaint, as amended, meet that heightened pleading requirement?

4. If a heightened pleading requirement exists for §1983 complaints in Kentucky, and Mertens' Complaint, as amended, did not meet that requirement, should the judgment be reversed with leave to amend her complaint to meet that requirement?

5. If a §1983 complaint is met with a motion to dismiss for failure to state a claim under CR 12.02(f), is a §1983 plaintiff required to make any "showing" at that stage of the proceedings?

6. Does Mertens' membership in the Democratic Party, and the fact that her replacement and the Governor who discharged her were Democrats, but of a different faction of the Democratic Party from Mertens, defeat Mertens' claim that she was discharged because of her political beliefs and affiliations in violation of her rights under the 1st Amendment?

In her Brief to the Kentucky Supreme Court, Mertens relied on state court authorities defining Kentucky's settled notice pleading principles: *Upchurch v. Clinton County*, Ky., 330

S.W.2d 428 (1959) (a KCR 12.02(f) motion admits as true the material facts of the complaint); *Ewell v. Central City*, Ky., 340 S.W.2d 479 (1960) (a complaint should not be dismissed unless it appears that the plaintiff would not be entitled to relief under any set of facts which could be proved to support the claim); *Pierson Trapp Company v. Peak*, Ky., 340 S.W.2d 456 (1960) ("it is immaterial whether the complaint states 'conclusions' or 'facts' as long as fair notice is given" *Id.*, at 460); *Gall v. Scroggy*, *supra*, (the pleadings should be liberally construed in a light most favorably to the plaintiff and all allegations in the complaint are to be taken as true).

The Supreme Court declined to defer to the truth of the allegations of Mertens' Complaint, as amended, holding instead that Mertens' position of Division Director of Child Support Enforcement was "a significant, high-level position in the state government system"; that "(o)nly the Commissioner of Social Insurance and the Secretary of the Cabinet for Human Resources were closer to the Governor in the ranking system"; that the position "involve(d) supervisory duties of more than two hundred employees"; that the Kentucky Civil Service laws define the position as "policy-making"; that "division directors who are considered policymakers are not certified"; and that "(i)f a division director disagrees, a hearing is held." On this point, the Court concluded, "clearly, it is in choosing or dismissing individuals at this high level of service that enables an administration to further the goals and implement the policies for which it was elected." (Appx. 3a)

The Supreme Court distinguished this case from *Branti* on the ground that the plaintiffs there "held only entry level positions. None of the political patronage cases cited by Mertens dealt with the high level office involved here." (Appx. 3a-4a).

The following excerpt from the Opinion of the Kentucky Supreme Court is central to its holding that Mertens' Complaint was deficient:

> In evaluating allegations of wrongful discharge in a § 1983 action, the defendant's motive must be ascertained. Tanner v. McCall, 625 F.2d 1183, 1193 (5th Cir. 1980). In determining motive, courts have consistently required more than a mere claim of the defendant's discriminatory intent. Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984); Haas v. Barren Co. Sheriff's Dept., 658 F.Supp. 877 (W.D. Mich. 1987). All of the federal circuit courts require this. Hobson, supra at 29-30.
>
> A pleading will not be sufficient to state a cause of action under §1983 if its allegations are only conclusions. Place v. Shephard, 446 F.2d 1239, 1244 (6th Cir. 1971). Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971); Chapman v. City of Detroit, 808 F.2d 459 (6th Cir. 1986).

The authorities relied on by Respondents at the briefing stage at the Supreme Court principally implicated qualified immunity, e.g., *Poe v. Hayden*, 853 F.2d 418 (6th Cir., 1988), *Gutierrez v. Municipal Court of Southeast Judicial District*, 838 F.2d 103 (9th Cir., 1988), and *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), upon which the Supreme Court relied heavily. Mertens, by her Reply Brief, was unable to dissuade the Supreme Court from relying on qualified immunity cases as authority that Mertens' Complaint failed to state a claim under a motion where qualified immunity was not involved.[6]

---

[6] Respondents, Wilkinson and Cowherd, were sued both in their individual and official capacities. Qualified immunity, however, did not form a ground for the dismissal motion, nor was it a stated basis for any of the rulings below.

Noting that Mertens relied on *Howlett v. Rose*, 496 U.S. ___, 110 L.Ed.2d 332, 110 S.Ct. ____ (1990), "for the proposition that when a state court is charged with the responsibility of enforcing federal law the state court must follow its regular mode of procedure," the Supreme Court held:

> The mere fact that state court claims do not require pleading with specificity is totally irrelevant to the issue of a §1983 pleading." (Appx. 5a)

Notwithstanding the absence of anything in the record, other than Mertens' sworn allegations to the contrary, that political affiliation is an important or appropriate requirement for the position involved, the Supreme Court concluded that Mertens' former office was "a significant policy-making position", that she has no legal recourse to protest her discharge under §1983 and that having had a sufficient opportunity to "meet any standard of pleading requirements provided by law," she was denied further leave to amend, and the Court of Appeals was affirmed. (Appx. 6a)

REASONS FOR GRANTING THE WRIT

Questions No. 1[7], 3[8] and 4[9]:

In a case decided under the Supremacy Clause, this Court in *Testa v. Katt*, 330 U.S. 386, 91 L.Ed.2d 967, 67 S.Ct. 810 (1947), held that a state cannot discriminate procedurally against

---

[7] Question No. 1: Must a state court apply its settled notice pleading principles to a 42 U.S.C. §1983 complaint, when deciding a motion to dismiss for failure to state a claim, in order to avoid discriminating against the federal claim in violation of the Supremacy Clause, where the §1983 complaint would have been sufficient under those settled principles, but the application of a theretofore unrecognized heightened pleading requirement operated to defeat the §1983 claim?

[8] Question No. 3: Where a state court dismisses a §1983 patronage discharge claim grounded on the conclusion that the employee's former office was "policy-making," does it impermissibly discriminate against the claim, contrary to the Supremacy Clause, as well as err, where the complaint was premised on the rule of *Branti v. Finkel* that the sole defense to the patronage discharge of a public employee satisfactorily performing the job is that political affiliation is an appropriate requirement for the effective performance of the office, where the state's settled notice pleading principles are that the allegations of the complaint are to be taken as true and construed most favorably to the plaintiff?

[9] Question No. 4: Where a state court §1983 complaint contained fact-specific allegations of *Branti v. Finkel* principles, and sought damages and injunctive relief for a patronage discharge, may the state court, consistent with the Supremacy Clause, dismiss the complaint for failure to state a claim, without leave to amend, based upon a heightened pleading requirement for §1983 actions theretofore unrecognized by the state, in the face of the state's settled notice pleading principles that (1) the complaint should not be dismissed unless it appears that the plaintiff would not be entitled to relief under any set of facts which could be proven in support of the claim, and (2) the allegations of the complaint are to be taken as true, construed in the light most favorable to the plaintiff, and may be in the form of conclusions so long as there is notice of the claim?

federal claims. With its holding that, "[t]he mere fact that state court claims do not require pleading with specificity is totally irrelevant to the issue of a §1983 pleading" (Appx. 5a), the Kentucky Supreme Court expressly discriminated procedurally against Mertens' §1983 claim. It applied a significantly higher pleading standard which a §1983 complaint in Kentucky's courts must meet in order to withstand an attack under KCR 12.02(f) than that required to be met by complaints asserting state law claims.

At least since *Maine v. Thiboutot*, 448 U.S. 1, 65 L.Ed.2d 555, 100 S.Ct. 2502 (1980), state courts have had authority to entertain actions under §1983. There is no question but that Kentucky exercises jurisdiction over such actions, e.g., *Board of Trustees of the U. of K. v. Hayse*, Ky., 782 S.W.2d 609 (1989).

In *Howlett v. Rose*, this Court at 110 L.Ed.2d 332, 351, held:

> . . . States may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law.

Judge McDonald by his dissent to the Court of Appeals' Opinion concisely spelled out the applicability of the Supremacy Clause to this action, the adequacy of Mertens' §1983 complaint under Kentucky's notice pleading principles and the fact that Mertens' complaint "easily fell within the parameters" of *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980), with respect to the necessary allegations of a §1983 complaint. (Appx. 20a).

These questions raise the important one of whether a state *must*, in light of the Supremacy Clause, apply its own neutral procedural rules when deciding the sufficiency of a complaint to state a §1983 claim, if to do otherwise would defeat the §1983 action. The question is particularly important, where, as here, the state expressly abandoned its settled notice pleading

principles solely because a §1983 claim was being addressed. Kentucky thereby discarded any semblance of neutrality where a §1983 claim is involved by establishing a heightened pleading standard which defies attainment.

Branti v. Finkel expressly abandoned the "policy-maker" test of *Elrod v. Burns*, and replaced it with an affirmative defense requiring the hiring authority to show that political affiliation is an appropriate requirement for the effective performance of the office if the patronage discharge claim is to be defeated. Mertens' complaint was premised on *Branti*, and even alleged the negative of that affirmative defense. (Appx. 29a). By declining to treat the allegations of Mertens' complaint as true as Kentucky's pleading principles require, the Kentucky Supreme Court impermissibly discriminated against the §1983 claim. In the same breath, the Court committed error by defining Mertens' former office as a "policy-making" one and affirming the dismissal. Thereby, the Court erroneously followed the *Elrod* rule which was repudiated by *Branti*.

Under *Testa v. Katt, supra*, and the Supremacy Clause, such discrimination by the highest court of Kentucky against a federal claim, here §1983, is impermissible. Review should be granted to so hold.

Question No. 2[10]:

At every level of the courts below Mertens unsuccessfully argued that the heightened pleading standard advocated by

---

[10] Question No. 2: Is there an inherent heightened pleading requirement which a §1983 complaint must meet in order to withstand a motion to dismiss for failure to state a claim, where qualified immunity is not implicated in the motion?

Respondents had its origin in *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982). With its heavy reliance on *Hobson v. Wilson*, *supra*, and its specific reference to pages 29 and 30 of *Hobson* (Appx. 4a), the Kentucky Supreme Court exposed its erroneous basis for concluding that it was required by federal law to insist that §1983 complaints meet a higher pleading standard than that which must be met by state law claims.

At pages 29 and 30 of *Hobson*, the *Hobson* court was engrossed in an analysis and application of the principles of *Harlow v. Fitzgerald*, i.e., qualified immunity principles. Of course, when qualified immunity is being addressed, the court must have at hand a complaint which sufficiently pleads the constitutional right claimed to have been violated so that the court can determine whether that right was clearly established when allegedly violated. It is submitted that Mertens' complaint ever met that test.

This court has never specifically settled the important question of federal law of whether there is an inherent heightened pleading standard applicable to §1983 complaints which must be met in order to withstand a motion to dismiss for failure to state a claim where qualified immunity was not raised by the motion. Accepting review and settling this question, would establish principles upon which both federal and state trial courts could rely in addressing dismissal motions unaccompanied by the qualified immunity defense.

Question No. 5[11]:

This Court has never held that §1983 actions have some special or unique quality which requires courts to treat the complaint differently from any other when resolving a dismissal motion.

What a conclusory pleading is, often is not susceptible to easy resolution. An argument whether or not Mertens' allegations that she "satisfactorily performed her job" or that she was "discharged for her political beliefs," are conclusions, for example, can deteriorate into the "is so/is not" variety.

Engaging in the exercise of determining whether an allegation of a complaint is a "conclusion" serves no meaningful purpose. Testing an allegation by the standard of whether it serves notice on the defendant of the nature of the §1983 claim in order that defense may be made is meaningful, and is the test by which non-§1983 claims are evaluated by Kentucky's courts. *Pierson Trapp Company v. Peak, supra.* The court below declined to follow *Peak.*

This Court ought to grant review of this question to decide whether §1983 complaints should be analyzed by a standard whereby the complaint is deficient if conclusory, whether or not notice of the claim is present, the standard of the opinion below, or by a "notice of the claim" standard. This latter standard

---

[11] Question No. 5: Is a §1983 complaint for a patronage discharge conclusory, and thereby deficient to withstand a motion to dismiss for failure to state a claim, wherein it is alleged that the plaintiff satisfactorily performed her job, that she was affiliated with a different faction of the Democratic party from that of the newly elected governor, that she was terminated pursuant to the custom of the state whereby unclassified state employees not aligned with the newly elected governor are discharged and replaced by such governor's political allies, and that the sole reason for, or a substantial or motivating factor for her discharge was her political beliefs?

obtains in the Third Circuit, as well as the D.C. Circuit, but not in Kentucky.

Other Reasons for Granting the Writ

The Third Circuit Court of Appeals has decided the important federal question of what must be alleged in a complaint to state a claim under §1983, in order to withstand a motion to dismiss for failure to state a claim. So too has Kentucky's highest court. The Third Circuit and Kentucky's highest court are in conflict. If Mertens' complaint had been subjected to the standard followed by the Third Circuit Court of Appeals, her complaint would not have been dismissed.

In reviewing the dismissal of a §1983 claim under F.R.Civ.P. 12(b)(6) without leave to amend, the Third Circuit in *District Council 47, American Federation of State, County and Municipal Employees, AFL-CIO v. Bradley*, 795 F.2d 310 (3d Cir., 1986), held that it had established a higher threshold of factual specificity for civil rights complaints. Citing earlier Third Circuit authorities, the *Bradley* court, stated that the test for evaluating the sufficiency of a civil rights complaint on a Rule 12(b)(6) motion to dismiss is

> . . . whether the complaint alleges sufficient facts so as to preclude a determination that the complaint is frivolous and whether sufficient facts are pleaded so as to provide a defendant with enough information so that an answer may be framed. *Id.* at 314.

The *Bradley* court went on to hold that it cannot be expected that a complaint provide proof of plaintiff's claims, nor a proffer of all available evidence. The Third Circuit's pleading standard with respect to §1983 claims, and Kentucky's settled notice pleading principles applicable to state court (non-federal) claims do not differ in any material respect. See, dissent, McDonald, J., Kentucky Court of Appeals. (Appx. 19a-20a).

Purporting to follow *Hobson v. Wilson*, *supra*, the Kentucky Court's Opinion below actually conflicted with it. The D.C. Circuit in *Hobson*, at 29, held:

> The allegations on this issue (that defendants acted with an unconstitutional motive) need not be extensive, but they will have to be sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds. (Parenthetical supplied).

Mertens' complaint satisfies this D.C. Circuit standard even when tested against a dismissal motion raising the qualified immunity defense. Respondents have no realistic argument that they could not ascertain from Mertens' §1983 complaint that she claimed a violation of her 1st Amendment rights as being a victim of Kentucky's time-honored custom whereby newly elected governors dismiss all non-classified state employees who had not aligned themselves with the governor during the preceding election.[12]

There is an additional factor which evidences the Kentucky's Supreme Court's violation of the non-discriminatory principle of *Testa v. Katt*: the Court concluded its Opinion by holding that "Mertens has had sufficient opportunity to met any standard of pleading requirements provided by law and there is no reason to

---

[12] Under Kentucky's Constitution, governors serve a 4-year term and are not permitted to succeed themselves.

give further leave to amend this complaint."[13] (Appx. 6a). Mertens' had had but one opportunity to amend her complaint, but was denied any opportunity to meet the newly-created heightened standard of the Opinion itself.[14] Under KCR 15.01 "leave (to amend) shall be freely given when justice so requires." Thus, the Court discriminated against Mertens' §1983 claim by failing to follow its own procedural rule.

If Mertens' §1983 complaint had been subjected to Third Circuit analysis, or the D.C. Circuit's analysis or this Court's analysis under *Siegert v. Gilley*, 500 U.S. ___, 114 L.Ed.2d 277, 111 S.Ct. ___ (1991), where qualified immunity is implicated, or Kentucky's own settled notice pleading principles, it would have survived a motion to dismiss for failure to state a claim. It is only because Kentucky created an unprecedented, heightened pleading requirement for §1983 claims in its courts that her complaint was dismissed, and the Supremacy Clause offended.

CONCLUSION

WHEREFORE, Petitioner prays that her Petition for Writ of Certiorari to the Kentucky Supreme Court be granted to review the decision thereof, with proceedings pursuant to the Rules of this Court.

---

13 Contrary to this ruling, the Third Circuit in *Bradley* ruled that dismissal of a §1983 complaint as insufficient to state a claim for factual allegation deficiencies, the district court at least should have granted plaintiffs leave to amend their complaint to provide sufficient specific factual allegations.

14 The 4th question of law which the Kentucky Supreme Court granted discretionary review was: "If a heightened pleading requirement exists for §1983 complaints in Kentucky, and Mertens' Complaint, as amended, did not meet that requirement, should the judgment be reversed with leave to amend her complaint to meet that requirement?"

Respectfully submitted,

WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507
(606) 254-9086
ATTORNEY FOR PETITIONER

RENDERED: January 16, 1992
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
90-SC-778-DG

PATRICIA A. MERTENS — APPELLANT

ON REVIEW FROM COURT OF APPEALS

V. 89-CA-1829

FRANKLIN CIRCUIT COURT NO. 89-CI-98

WALLACE G. WILKINSON, Governor,
Commonwealth of Kentucky,
Individually, and in his official capacity;
HARRY J. COWHERD, M.D., Secretary, Cabinet
for Human Resources, Commonwealth of Kentucky,
Individually, and in his official capacity;
THOMAS GREENWELL, Commissioner of Personnel,
Commonwealth of Kentucky, in his official capacity;
FRANK WILLEY, (Acting) Executive Director of
Personnel Management, Commonwealth of Kentucky,
Cabinet for Human Resources, in his official
capacity — APPELLEES

MEMORANDUM OPINION OF THE COURT
AFFIRMING

This appeal is from a decision of the Court of Appeals which affirmed a dismissal by the Franklin Circuit Court of Mertens' complaint for failure to state a claim for which relief may be granted pursuant to CR 12.02(f).

Mertens was hired by the Cabinet for Human Resources on April 1, 1987, as the Division Director of Child Support Enforcement. Under K.R.S. 18A.115(i), the position of Division Director is unclassified unless certified for classification pursuant to K.R.S. 18A.170. Mertens admits in her complaint that her position was unclassified. An individual holding an unclassified position is subject to dismissal upon written notice by the appointing authority "for cause, or without cause." 101 KAR 3:050(3). Mertens was dismissed from her position on January 22, 1988. She admits that her dismissal was without cause.

On January 20, 1989, Mertens filed this action pursuant to 42 U.S.C. §1983 in Franklin Circuit Court alleging violation of her constitutional rights under the First and Fourteenth Amendments. She claims that she was terminated from her unclassified position with the Cabinet for Human Resources because she was an appointee in the administration of Governor Martha Layne Collins and did not support Wallace Wilkinson during his gubernatorial campaign. Specifically, she alleged in her original complaint that "a substantial or motivating factor . . . or the sole reason for the discharge of plaintiff by defendants . . . was her political beliefs."

The circuit court dismissed Mertens' original complaint with leave to amend "to state nonconclusory allegations of evidence of unconstitutional motive or intent." Mertens' subsequent complaint was dismissed on the basis that it again failed "to state a claim in terms of facts rather than conclusions." The Court of Appeals in a 2-1 decision affirmed the circuit court. We affirm the Court of Appeals.

Mertens argues that her complaint stated a claim for which relief may be granted because under Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), discharging a public employee solely because of the employee's political affiliation when political affiliation is not a requirement for the effective performance of that position, and where the employee had

satisfactorily performed the job, is violative of the First Amendment and also made applicable to state employees through the Fourteenth Amendment.

It is clear that the First Amendment forbids discharge of public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. Rutan v. Illinois, ___ U.S. ___, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), Branti v. Finkel, supra; Elrod v. Burns, 427 U.S. 347. 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Moreover, the U.S. Supreme Court stated in Rutan that a government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high level employees on the basis of their political views. S.Ct. at 2737, L.Ed.2d at 66, citing Elrod v. Burns, supra.

We believe it is clear that Mertens' position, that of Division Director of Child Support Enforcement, is a significant, high-level position in the state government system. Only the Commissioner for Social Insurance and the Secretary of the Cabinet for Human Resources were closer to the Governor in the ranking system. It also involves supervisory duties of more than two hundred employees. The civil service laws embodied in Kentucky's statutory system clearly define the position as "policy-making." Division directors who are considered policy makers are not certified. If a division director disagrees, a hearing is held. The Division Director of Child Support Enforcement is not a certified position. Clearly, it is in choosing or dismissing individuals at this high-level of service that enables an administration to further the goals and implement the policies for which it was elected.

There is no merit in Mertens' contention that Branti v. Finkel, supra, compels a different result. The plaintiffs in Branti held only entry level positions. None of the political patronage

cases cited by Mertens dealt with the high level office involved here.

The circuit court and the Court of Appeals in this case found that Mertens failed to meet the pleading requirement involved in a § 1983 case. Mertens argues that the courts applied too strenuous a pleading requirement and should have applied a simple notice pleading requirement. We believe the standard applied was the correct pleading requirement.

In order to state a cause of action under § 1983, the plaintiff must have alleged that the defendant, acting under color of law, deprived her of some right, privilege or immunity secured by the Constitution. Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed 1324 (1943); Poe v. Hayden, 853 F.2d 418 (6th Cir. 1988).

In evaluating allegations of wrongful discharge in a § 1983 action, the defendant's motive must be ascertained. Tanner v. McCall, 625 F.2d 1183, 1193 (5th Cir. 1980). In determining motive, courts have consistently required more than a mere claim of the defendant's discriminatory intent. Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984); Haas v. Barren Co. Sheriff's Dept., 658 F.Supp. 877 (W.D. Mich. 1987). All of the federal circuit courts require this. Hobson, supra at 29-30.

A pleading will not be sufficient to state a cause of action under §1983 if its allegations are only conclusions. Place v. Shephard, 446 F.2d 1239, 1244 (6th Cir. 1971). Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971); Chapman v. City of Detroit, 808 F.2d 459 (6th Cir. 1986).

Mertens has stated that she was placed in the office of Division Director of Child Support Enforcement by former Governor Martha Layne Collins. She states when Collins was succeeded by Wilkinson, he replaced her with a member of his "political faction." Mertens does not allege that she publicly supported anyone in the Democratic primary or that she opposed the Wilkinson faction of the Democratic party. There

is no allegation that she publicly criticized the Wilkinson Administration, much less that she was replaced for such criticism.

The position of Division Director of Child Support Enforcement is unclassified by statute. KRS 18A.115(I). Mertens was subject to dismissal upon written notice by the appointing authority "for cause or without cause." 101 KAR 3:050(3). In stating her case, Mertens merely states that her discharge was done with unconstitutional motive.

Mertens cites Howlett v. Rose, ___ U.S. ___, ___ S.Ct. ___, 110 L.Ed. 2d 332 (1990) for the proposition that when a state court is charged with the responsibility of enforcing federal law, the state court must follow its regular mode of procedure. Therefore, in this instance, a notice pleading is sufficient. We do not agree. Pleading in federal courts, as in this Commonwealth, is notice pleading. It is only in actions brought pursuant to § 1983, where motive is the issue, that heightened pleading standards are mandated. The mere fact that state court claims do not require pleading with specificity is totally irrelevant to the issue of a §1983 pleading.

We take note of our recent decision in Martin v. Corrections Cabinet, ___ S.W.2d ___ (1991), which also involved an unclassified employee, who also alleged that she was terminated from her state job for political reasons. The case here is distinguishable in several respects. The plaintiff in Martin claimed that she was discharged for her attempt to discipline a politically influential classified employee. Mertens alleges she was removed solely because she did not support Wilkinson during the gubernatorial campaign. The primary difference is that an unclassified or nonmerit employee who alleges that she was terminated for enforcing the legal prohibition against political favoritism in administration of the merit system, has a right to appeal to the Personnel Board under KRS 18A.095(9) and 18A.095(14)(9). KRS 18A.095(9) permits

an unclassified employee dismissed "for cause" to file an appeal with the Personnel Board. Mertens admitted in her complaint that her dismissal was without cause.

The governor in this instance had a right to select a Director of child Support Enforcement he could count on to carry out the policies of his administration under Branti, Elrod and Rutan. A person serving in a significant policy-making position such as the Director of Child Support Enforcement can be appointed or dismissed solely on the basis of his political views. Mertens failed to state a claim under the requirements of the Civil Rights Act and therefore has no legal recourse to protest her discharge from employment.

Mertens has had sufficient opportunity to meet any standard of pleading requirements provided by law and there is no reason to give further leave to amend this complaint.

The decision of the Court of Appeals is affirmed.

All concur.

ATTORNEY FOR APPELLANT:
William C. Jacobs
173 North Limestone Street
Lexington, Kentucky 40507

ATTORNEYS FOR APPELLEES:
Ryan M. Halloran
General Counsel

Trisha Zeller James
Cabinet for Human Resources
Office of Counsel
275 East Main - 4 West
Frankfort, Kentucky 40621

RENDERED: September 7, 1990; 3:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 89-CA-1829-MR

PATRICIA A. MERTENS — APPELLANT

V. APPEAL FROM FRANKLIN CIRCUIT COURT
HON. JOYCE M. ALBRO, JUDGE
ACTION NO. 89-CI-098

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually and in his official capacity; HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, and in his official capacity; THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity; FRANK WILLEY (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity — APPELLEES

AFFIRMING

* * * * * * * * *

BEFORE: HOWERTON, CHIEF JUDGE, HOWARD, and McDONALD, JUDGES.

HOWARD, JUDGE. Appellant appeals from the dismissal by the Franklin Circuit Court of her complaint under 42 U.S.C. §1983 against the appellees. The Franklin Circuit Court dismissed her complaint pursuant to CR 12.02(f) for failing to state a claim for which relief can be granted.

Mertens became employed as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky on April 1, 1987. This position as a division director is listed by statute, KRS 18A.115, as a nonclassified position. There was no contract accompanying her employment. At the time she obtained this position, the governor of Kentucky was Martha Layne Collins.

She continued in this position until January, 1988. In the interim, Governor Collins' term expired, and Wallace Wilkinson was elected governor and took office in December, 1987. On January 22, 1988, the appellant was informed through a letter from the Executive Director of the Cabinet for Human Resources that her services would no longer be needed after the close of business on January 29, 1988. The letter bluntly stated that she would be terminated on that date. No cause was given for this termination.

On January 20, 1989, the appellant filed a complaint, under 42 U.S.C. §1989, against Governor Wallace G. Wilkinson and Secretary of the Kentucky Cabinet for Human Resources, Mr. Harry J. Cowherd, both individually and in their official capacities. She also filed suit against Thomas Greenwell, Commissioner of Personnel, and Frank Willey, Acting Executive Director of Personnel Management. Both of these appellees were sued in their official capacities only. In this complaint, appellant alleged that a substantial factor and reason for her discharge was that she failed to support the new governor during

the previous election. She contended that her right to freedom of speech and political beliefs under the First and Fourteenth Amendments to the United States Constitution had been violated. She sought compensatory damages for lost earnings, embarrassment, humiliation, and emotional and mental distress that she allegedly suffered. She also sought punitive damages against Wilkinson and Cowherd. Additionally, she sought injunctive relief as she sought to be reinstated to her former employment at the level of compensation and benefits she would have been earning had she still been employed. She further sought costs including reasonable attorney's fees pursuant to 42 U.S.C. §1988.

The appellees moved to dismiss the claim under CR 12.02(f) due to their belief that appellant had failed to state a claim upon which relief can be granted and under the doctrine of sovereign immunity. After a hearing on this motion, the Franklin Circuit Court granted the motion, but gave appellant ten days to amend her complaint.

The amended complaint also became the subject of a motion to dismiss pursuant to CR 12.02(f). After a hearing, the Franklin Circuit Court entered an order dismissing appellant's complaint for failing to state a claim for which relief can be granted. Appellant subsequently made a motion pursuant to CR 59.05 which the court overruled. This appeal followed.

This action has been properly presented to the Franklin Circuit Court and now to this Court under 42 U.S.C. §1983. An action under 42 U.S.C. §1983 may properly be presented in a state court. Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L.Ed.2d 555 (1980); Martinez v. California, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980); Sowders v. Adkins, Ky., 646 S.W.2d 344 (1983). See also Board of Trustees of the University of Kentucky v. Hayse, Ky., 782 S.W.2d 609 (1989).

In the instant case, some question surrounds whether the parties were properly pleaded. 42 U.S.C. §1983 provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The meaning of "person" within this statute has been the subject of much debate and litigation. The United States Supreme Court in Will v. Michigan Department of State Police, U.S. , 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989), has held that neither a state nor a state official acting in his or her official capacity are persons within the meaning of §1983. The Court ruled that the traditional principles of sovereign immunity and the history of §1983 commanded such a result. The Court ruled that a suit against a state official acting in his or her official capacity is not a suit against the official but is really a suit against the official's office. This is basically a suit against the state itself. Will, supra, at 2311. See also Kentucky v. Graham, 473 U.S. 159, 105 S. Ct. 3099, 87 L.Ed.2d 114 (1985). A state official, however, when sued in his or her official capacity for injunctive relief would be a person under §1983 because official capacity actions for prospective relief are not treated as actions against the state. Will, supra, at 2311.

It is important to once again distinguish between §1983 suits brought against a person individually and an official acting in his or her official capacity. A personal capacity suit is brought to impose personal liability upon a governmental official for actions he or she took under color of state law and which violate another person's constitutionally protected rights. Kentucky v. Graham, supra, at 3105. This person may be carrying out the duties of his or her job but still engages in a personal wrongdoing and may be held liable. Hayse, supra, at 615. An official capacity suit is generally another way of bringing an

action against an entity of which the officer is an agent. Graham, supra. It is often an action trying to hold the official vicariously liable for acts of subordinates in which the official was not directly involved or for the state's policies. Hayse, supra, at 615. Such official actions and vicarious liability are not allowable under §1983. Will, supra, Hayse, supra.

In the instant case the appellant has properly brought her §1983 claims against Wilkinson and Cowherd individually and against all appellees for injunctive relief. She cannot bring an action against the state officials acting in their official capacities pursuant to Will, supra.

The Franklin Circuit Court in its opinion stated that the appellant failed to avail herself of state administrative remedies that were available to her, and as a result her §1983 claim, based upon deprivation of liberty interests, had to be dismissed. While we uphold the trial court's decision on other grounds, we do not believe that the appellant erred by bringing her §1983 action in Franklin Circuit Court. After reviewing the applicable statutes and regulations, we cannot find that appellant had another remedial avenue open to her through any of the statutes or regulations cited by the appellees or the trial court.

KRS 18A.095(9) applies to the appellant's situation. It states:

> Any unclassified employe who is dismissed, demoted, suspended, or otherwise penalized for cause may, within thirty (30) days after such dismissal, demotion, suspension, or other form of penalization, appeal to the board for review thereof.

In the instant case, by the appellees' own admission, appellant was fired without cause, so she is afforded no relief under this provision. KRS 18A.095(14)(a) is designed to afford relief only to classified state employees on a register. Additionally, 101 KAR 1:370 §1(3) is contingent by its own terms upon 101 KAR 1:350. 101 KAR 1:350 §16 specifically governs appeals by

unclassified employees. Subsection 1 of that provision again states that any unclassified employee who is dismissed, demoted, or suspended, or otherwise penalized for cause may appeal to the personnel board for review pursuant to the applicable section of this regulation. Once again the avenue for a remedy to appellant has been closed as she was not dismissed for cause. In the instant case, appellant properly brought her action before the Franklin Circuit Court.

The Franklin Circuit Court in this case found that the appellant failed to meet the pleading requirements involved in a §1983 case, and accordingly granted the appellee's motion under CR 12.02(f) to dismiss appellant's action for failure to state a claim upon which relief can be granted. Appellant has argued that the Franklin Circuit Court applied too strenuous a pleading requirement and should have applied a simple notice pleading requirement. She contends that she easily met the notice pleading requirements. We believe the Franklin Circuit Court applied the correct pleading requirements.

Appellant bases her argument on several Kentucky cases which have addressed pleading requirements in various fact patterns. It is true that under Kentucky's notice pleading rules, a pleading should not be construed against the pleader, and the complaint should not be dismissed unless it appears to a certainty that the claimant would not be entitled to relief under any state of facts which could be proved in support of her claim. Ewell v. Central City, Ky., 340 S.W.2d 479 (1960); Spencer v. Woods, Ky., 282 S.W.2d 851 (1955); Pierson Trapp Company v. Peak, Ky., 340 S.W.2d 456 (1960). Further, under general principles of Kentucky law, a judgment on the pleadings can be granted only if on the facts, the moving party is clearly entitled to a judgment. Spencer, supra. When considering a motion to dismiss under CR 12.02(f), the pleadings should be liberally construed in a light most favorable to the plaintiff, and all allegations in the complaint taken to be true. Gall v. Scroggy, Ky. App., 725 S.W.2d 867, 869 (1987). See also Christian v.

Belcher, 888 F.2d 410 (6th Cir. 1989). Under general Kentucky rules, the complaint can be stated in conclusions if it provides the other parties with sufficient notice. Pierson Trapp Company, supra, at 460.

In cases alleging deprivation of constitutional rights however, the claimant must meet certain requirements in her pleadings. Two elements are essential for stating a claim under §1983; the objectionable conduct must have been committed under the color of state law, and the claimant must have been deprived of a right, privilege or immunity protected by the United States Constitution. Ana Leon T. v. Federal Reserve Bank of Chicago, 823 F.2d 928 (6th Cir. 1987). The requirements for asserting constitutional deprivations in §1983 claims are the same for those establishing the underlying constitutional violations. Gutierrez v. Municipal Court of The Southeast Judicial District, County of Los Angeles, 838 F.2d 1031 (9th Cir. 1988). In cases involving a claim that the defendants acted with an unconstitutional motive, the plaintiff must in her pleadings provide nonconclusory allegations of evidence of this intent in order for her to proceed to discovery on this claim. All of the federal circuit courts require this. Hobson v. Wilson, 737 F.2d 1, 29-30 (D.C. Cir. 1984). This is in keeping with principles established by the United States Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). The allegations in the complaint will have to be sufficiently precise to place the defendants on notice of the claim's nature and to enable them to prepare a response. Hobson, supra, at 29. A pleading will not be sufficient to state a cause of action under the Civil Rights Act if its allegations are but conclusions. Place v. Shepherd, 446 F.2d 1239, 1244 (6th Cir. 1971). See also Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971); Chapman v. City of Detroit, 808 F.2d 459 (6th Cir. 1986). Complaints containing only conclusory, vague, or general allegations of actions to

deprive someone of constitutional rights should be dismissed. Ostrer v. Aronwald, 567 F. 2d 551 (2d Cir. 1977).

These tests should be met in constitutional cases to avoid ushering the defendants into discovery where the plaintiffs have no hope of success on the merits. This rule should not be applied to rigidly, however. The United States Supreme Court in Harlow required that mere conclusory allegations of unconstitutional motive, devoid of factual support, must be found lacking and be dismissed. Hobson, supra, at 31. It is necessary to apply the above principles to the specific allegations of appellant's claim.

Appellant in her §1983 claim has asserted that certain rights guaranteed to her through the Fourteenth Amendment of the United States Constitution have been violated. The Fourteenth Amendment, Section 1 provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In this case, appellant has primarily contended that her First Amendment rights to freedom of speech have been violated. There is also some indication that she believed she was deprived of property or other liberty when she was dismissed from her position. We will briefly address the latter two points first.

It is important to see if an interest is within the Fourteenth Amendment protection of liberty and property. The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that an individual has acquired in specific benefits. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972). Property interests are created and defined by existing rules and understandings that stem from state law or contracts between

the parties. Roth, supra, at 2709. "A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." Bishop v. Wood, 426 U. S. 341, 96 S. Ct. 2074, 2077, 48 L.Ed.2d 684 (1976).

Determining whether an employer has granted the employee any form of guarantee must be decided from examining the particular statute or ordinance. Bishop, supra. Where neither the terms of a claimant's appointment nor any statute or law secured any entitlement or interest in re-employment, the claimant has not established a property interest sufficient under the Fourteenth Amendment to entitle the claimant to a hearing concerning her re-employment. Roth, supra, at 2710.

In the instant case, appellant had no property interest in retaining her position because under Kentucky law, her position was not classified. There was no contract accompanying her employment. She served as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources. KRS 12.050 specifically states that directors of divisions shall be appointed by heads of departments with the written approval of the governor. KRS 18A.115(i) also states that division directors are not included under classified service. 101 KAR 3:050 (3) further holds that an unclassified state employee may be dismissed by the appointing authority upon written notice for cause or without cause. Under 101 KAR 3:050(1), employees in executive policymaking positions serve at the pleasure of the appointing authority. As stated earlier, under 101 KAR 1:350 §16(1) only an unclassified employee who is dismissed for cause may appeal to the personnel board for review. Thus, after reviewing the terms of appellant's position and the applicable Kentucky statutes, it is clear appellant has shown no sufficient property interest in her position.

Appellant also was not deprived of any liberty interest when she was dismissed. A liberty interest in an employment setting is invoked when the employee's dismissal recognizes a stigma or disability that forecloses other employment possibilities. Roth, supra, at 2707. There must be untruths published about the employee, and these statements must prevent her from securing further employment. Roth, supra. See Cleveland Board of Education v. Loudermill, 470 U. S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985). A person is not deprived of liberty when she is simply not rehired in one job but remains as free as before to seek another. Roth, supra, at 2708.

Appellant was deprived of no such interest in the instant case. She was not dismissed for cause, and no such stigma exists.

Appellant in her §1983 complaint has asserted that appellees deprived her of her First Amendment freedoms of speech. It is fundamental that rights secured by the First Amendment against abridgement by the United States are secured to all persons by the Fourteenth Amendment against abridgment by a state. Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L.Ed 1093 (1940). Infringement of First Amendment rights clearly are actionable under §1983 claims.

It has also been generally held that an employee who is not tenured or has no guarantee of re-employment may not be denied his or her job on a basis that infringes on the employee's constitutionally protected interests such as the First Amendment freedom of speech. Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 2697, 33 L.Ed.2d 570 (1972); Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L.Ed.2d 574 (1980); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977).

In proving a First Amendment claim, the claimant must show that her conduct or speech was constitutionally protected by the First Amendment, and that this conduct was a substantial factor in the employer's decision not to rehire the employee.

Mt. Healthy, supra, at 574. Givhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S. Ct. 693, 58 L.Ed.2d 619 (1979). These components should be demonstrated through sufficient factual allegations. Douglas v. City of Jeannette, 319 U.S. 157, 63 S. Ct. 877, 87 L.Ed. 1324 (1943). The factual proof of the unconstitutional motive in such a case must also be pleaded. Hobson, supra. These pleadings are important to allow the employer a chance to rebut the contentions.

The United States Supreme Court has additionally considered the impact of political patronage systems upon employees' First Amendment freedoms in at least two cases, Branti, supra and Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). The Court has clearly held that the right to associate with the political party of one's choice is an integral part of the First Amendment freedoms of belief and association. Elrod, supra, at 2681. A public employee is protected by the First Amendment from discharge based on what she has said and based on what she believes. Branti, supra, at 1293. The Court in Branti and Elrod held that political patronage systems in some cases where they compel or restrain belief are violative of the First Amendment.

The Court in Elrod applied the classic First Amendment test and held that if political patronage hirings and dismissals are to survive constitutional scrutiny, they must further some vital end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights. Elrod, supra, at 2685. The Court found that dismissing non-policy making employees failed this test, but that party affiliation may be an acceptable requirement for some types of government employment. Branti, supra,at 1294. The Court further held that there is a government interest in furthering public policy provisions and in government efficiency and effectiveness. It held that that interest can be fully satisfied by limiting patronage

dismissals to policy making positions. Elrod, at 2689. The ultimate inquiry is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. Branti, supra, at 1295.

The Supreme Court further outlined some of the factors to determine whether such a job fits the above description. Some of these include the nature of the responsibilities, the broadness of the scope of the responsibilities, and whether the employer acts as an advisor in certain matters. Elrod, supra, at 2687.

In the instant case, we find that the appellant has failed to meet her burden of showing that the appellees infringed upon her First Amendment rights. She has not asserted any conduct, speech, or belief that was constitutionally protected, nor has she shown that the appellees decided to dismiss her because of any such conduct.

Her job in this case by statute was nonclassified and by statute and regulation she could be dismissed for cause or without cause. The General Assembly apparently intended her job to be considered as a policy making position. She was the director of the division for enforcement of child support, and in this position would have authority over others and would have influence over her division's activities. The claimants in Elrod and Branti were clearly not policymaking employees. Thus, she has failed to show that she falls within the prohibitions of these cases.

She was a member of the Democratic Party and her replacement was a Democrat. She has not adequately shown by facts what activities or conduct she undertook that would have been protected speech nor has she shown the intent of the appellees to deprive her of this right. This distinguishes the instant case from the other cases cited by appellant - specifically Elrod and Branti. This case is also distinguishable from Sindermann and Mt. Healthy where the claimants were able to

factually show constitutionally protected conduct that the employer used to retaliate against the employee.

Even considering the pleadings in the light most favorable to the appellant, she has failed in this case to state a claim on which relief can be granted. The decision of the Franklin Circuit Court is affirmed.

CHIEF JUDGE HOWERTON CONCURS. McDONALD, JUDGE, DISSENTS.

McDONALD, JUDGE, DISSENTING. I dissent from the majority's holding that the complaint was inadequate and that Mertens "failed to meet her burden of showing that the appellees infringed upon her First Amendment rights." When an action is brought in state court to enforce rights or claims under federal law, the Supremacy Clause of the United States Constitution perforce requires that federal law be applied by the state court. See Maine v. Thiboutot, 448 U.S. 1, 11, 100 S. Ct. 2502, 2508, 65 L.Ed.2d 555 (19890). However, in its exercise of concurrent jurisdiction of such actions, the state's procedural rules are applicable unless those rules are being used to defeat the rights granted by Congress or the Constitution. Brown v. Western Railway of Alabama, 338 U.S. 294, 296, 70 S. Ct. 105, 106, 94 L.Ed.2d 100 (1949). These concepts were recently reiterated in Howlett v. Rose, ____ U.S. ____, 58 U.S.L.W. 4755 (decided June 11, 1990), thusly:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum--although both might well be true--but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to

their regular modes of procedure. Id. at 4758 [emphasis added].

The majority has set out the well-settled principles applicable to notice pleading in this Commonwealth, which, if applied to this case, in my opinion, require reversal of the trial court's dismissal. Those principles are that in ruling on a motion for failure to state a claim, the pleadings should be liberally construed in a light most favorable to the plaintiff, all allegations in the complaint must be considered to be true, and the motion must be dismissed "unless it appears the plaintiff would not be entitled to relief under any state of facts which could be proved in support of her claim." Ewell v. Central City, Ky., 340 S.W.2d 479, 481 (1960), and Gall v. Scroggy, Ky. App., 725 S.W.2d 867 (1987).

The heightened pleading requirement of factual specificity imposed by some of the lower federal courts and applied by the majority of this panel simply does not comport to our procedural rules. All CR 8.01 requires is a "short and plain statement of the claim showing that the pleader is entitled to relief .... It is immaterial whether the complaint states 'conclusions' or 'facts' as long as fair notice is given." Pierson Trapp Company v. Peak, Ky., 340 S.W.2d 456 (1960).

Although §1983 litigation can become quite complex, the complaint need establish only two things. "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L.Ed.2d 572 (1980). A cursory review of Mertens' complaint shows that her allegations easily fall within the parameters of Gomez and CR 8.01 and adequately states a claim for relief.

In my opinion the trial court clearly abused its discretion in dismissing the plaintiff's action. I would reverse and remand for further proceedings.

ATTORNEY FOR APPELLANT:
William C. Jacobs
Lexington, Kentucky

ATTORNEYS FOR APPELLEES:
Ryan M. Halloran
Chief Counsel - Office of Counsel
Cabinet for Human Resources

Trisha Zeller James
Office of the Counsel
Frankfort, Kentucky

F I L E D
MAR 29 1989
FRANKLIN CIRCUIT COURT
JANICE MARSHALL, CLERK

FRANKLIN CIRCUIT COURT
DIVISION III
ACTION NO. 89-CI-0098

PATRICIA A. MERTENS PLAINTIFF

V. ORDER

WALLACE G. WILKINSON, Governor, et al. DEFENDANTS

On motion of defendants, Wilkinson, Cowherd, Greenwell and Willey, and the Court being sufficiently advised;

IT IS ORDERED AND ADJUDGED that defendants' Motion to Dismiss be and hereby is granted. Plaintiff is hereby given ten days in which to amend her complaint to state non-conclusory allegations of evidence of unconstitutional motive or intent.

IT IS FURTHER ORDERED that defendants' motion for a protective order is hereby granted and that no discovery in the above-styled case be taken until further order of this court.

This the 27 day of March, 1989.

/s/ Joyce M. Albro
FRANKLIN CIRCUIT JUDGE
DIVISION THREE

F I L E D
JUL -5 1989
FRANKLIN CIRCUIT COURT
JANICE MARSHALL, CLERK

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION III
ACTION NO. 89-CI-0098

PATRICIA A. MERTENS PLAINTIFF

VS. ORDER

WALLACE G. WILKINSON, Governor, et al DEFENDANT

** ** ** ** ** ** ** ** ** ** ** ** ** ** ** ** ** ** ** **

This matter having come on for hearing on the 28th day of April, 1989 on Defendant's Motion to Dismiss Plaintiff's Amended Complaint and the parties having been present through counsel and the Court having reviewed the filings of record and the authorities cited therein and having conducted its research and having heard the arguments of counsel does hereby ORDER AND DECREE:

That Defendant's Motion to Dismiss is granted. As grounds for its ruling the Court states as follows:

Plaintiff, Patricia Mertens served as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources from April 1, 1987 until January 27, 1988 when she was discharged from her duties. The discharge was "without cause". All Division Director positions are exempted from the classified service by KRS 18a.115 and persons holding those

positions are subject to dismissal upon written notice by the appointing authority "...for cause, or without cause". 101KAR3:050(3)

This claim is filed in state court under the provisions of 42USC § 1983.

Plaintiff's Counsel admitted in oral arguments that Plaintiff had no property interest in her unclassified employment. Counsel stated that she seeks to protect her "political beliefs". Neither counsel nor the Plaintiff has defined the precise contours of Plaintiff's political beliefs or how they interacted with the political beliefs of the Defendants to result in her dismissal SOLELY on grounds of those beliefs. Plaintiff has never clearly indicated what her political beliefs are or how those might have been communicated to Defendants. Nor has she ever stated what response from Defendants forms the foundation for her conclusion that politics was the motive behind her dismissal. Plaintiff does not claim to have made speeches or contributions to any particular candidate nor does she present an instance when she was expected to do so for Governor Wilkinson and declined. She states only that she was appointed by Governor Martha Layne Collins.

Plaintiff relies heavily on the Branti case which was filed in federal court based upon federal constitutional rights. Plaintiff is in state court asserting federal constitutional rights which can only be applied to the state through the operation of the Fourteenth Amendment. Without having shown a property interest in her employment which was protected by the Fourteenth Amendment, Plaintiff has failed to state a claim for 42USC § 1983 protection in state court. Upon that ground Plaintiff's complaint is dismissed.

Plaintiff did not file nor did she attempt to file any action seeking administrative remedies. Such remedies were available to Plaintiff. If she believed the action against her was based on discrimination due to her political opinions or affiliations she

could have filed a grievance with the agency. Detailed grievance procedures are set out in the regulations which include appeal rights to the Personnel Board. Under KRS18A.095(14)(a) Plaintiff could have filed a direct appeal to the Personnel Board if she believed she had been discriminated against. No grievance was filed, no action was brought before the Personnel Board. Adequate administrative remedies were available to Plaintiff. She chose not to avail herself of them. She cannot now claim deprivation of a liberty interest. Upon this ground Plaintiff's complaint is dismissed.

Plaintiff's pleadings contend that she was discharged because she did not support the Wilkinson faction of the Democratic Party and that the job was filled after her dismissal by someone who had been a Wilkinson supporter. She relies again on the Branti case which dealt with federal employees who were Republicans and who were able to make a showing that they were not in a policy making position and were able to make a showing that their discharge would be "solely for the reason that they were not affiliated with or sponsored by the Democratic Party". Plaintiff is affiliated with the Democratic party and is complaining of the actions of a Democratic governor. She claims that the position of Director of the Division of Child Support Enforcement is not a policy making position. She further claims that factionalism within the Democratic Part was the reason for her discharge. Her counsel in oral arguments indicated an eagerness to take on the entire system of unclassified appointments. Doing so might prove to be a worthwhile undertaking but before one is entitled to call that system into question, one is required to build a base from which to launch that attack. The allegations must be more than mere conclusions or unwarranted factual inferences. Plaintiff is required to state a claim in terms of facts rather than conclusions. This Court is aware that there are certain nebulae in the protection of the Constitution. This Court does, however, require that Plaintiff outline the contours of something that is

discernible in the mist. Even after having been given leave to file an Amended Complaint and having been made aware of this Court's requirement that heightened pleading requirements be met in order to state a claim Plaintiff, has not done so. The Court will not attempt to detail the leaps of logic and flights of fancy that would be required in order to find a claim stated here. Let us simply state that the Court does not feel compelled to assume along with Plaintiff, that others acted under the influence of unconstitutional motives when the few facts presented lend themselves just as easily to interpretations that carry no constitutional violation. Further the Court does not feel compelled to assume that a position of Division Director is not a policy making position when Plaintiff has provided nothing other than her own conclusions to refute the presumption created by the statutory inclusion of division director positions in the unclassified service. Upon this ground Plaintiff's Complaint is dismissed.

Plaintiff seeks to recover personally against Defendant Wilkinson and Defendant Cowherd. Plaintiff had made no showing that those defendants acted unlawfully or in excess of their legal authority nor has she made any showing of negligent action. Any claim for negligence is outside this Court's authority and to be rightly filed only with the Board of Claims. All other claims are barred by the doctrine of sovereign immunity. Upon this ground Plaintiff's complaint is dismissed.

In short, as was previously stated, Plaintiff's Complaint is Dismissed.

Entered this 30 day of ~~May~~ June, 1989.

/s/ Joyce Albro

JUDGE, FRANKLIN CIRCUIT COURT
DIVISION III

SUPREME COURT OF KENTUCKY
90-SC-778-DG

PATRICIA A. MERTENS — PETITIONER

ON REVIEW FROM COURT OF APPEALS
V. 89-CA-1829
FRANKLIN CIRCUIT COURT NO. 89-CI-98

WALLACE G. WILKINSON, Governor,
Commonwealth of Kentucky,
Individually, and in his official capacity;
HARRY J. COWHERD, M.D., Secretary, Cabinet
for Human Resources, Commonwealth of Kentucky,
Individually, and in his official capacity;
THOMAS GREENWELL, Commissioner of Personnel,
Commonwealth of Kentucky, in his official capacity;
FRANK WILLEY, (Acting) Executive Director of
Personnel Management, Commonwealth of Kentucky,
Cabinet for Human Resources, in his official
capacity — RESPONDENTS

ORDER

The petition for rehearing is denied.

All concur.

ENTERED: April 9, 1992.

/s/ Robert F. Stephens
CHIEF JUSTICE

F I L E D
JAN 20 1989
FRANKLIN CIRCUIT COURT
JANICE MARSHALL, CLERK

FRANKLIN CIRCUIT COURT
CIVIL BRANCH
III DIVISION

PATRICIA A. MERTENS PLAINTIFF

V. COMPLAINT NO. 89-CI-00098

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually, and in his official capacity; HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, and in his official capacity; THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity; FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity DEFENDANTS

* * * * * * * * * * *

Comes the Plaintiff, Patricia A. Mertens, for her Complaint herein against the Defendants, and states:

1. That Plaintiff, Patricia A. Mertens, became employed as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky on April 1, 1987;

2. That Defendant, Wallace Wilkinson, is the duly elected Governor of the Commonwealth of Kentucky, having been inaugurated on or about December 8, 1987;

3. That Defendant, Harry J. Cowherd, M.D., is the Secretary of the Cabinet for Human Resources;

4. That Defendant, Frank Willey, is the Executive Director of Personnel Management (Acting) of the Cabinet for Human Resources of the Commonwealth of Kentucky;

5. That Defendant, Thomas Greenwell, is the Commissioner of Personnel for the Commonwealth of Kentucky;

6. That on or about January 29, 1988, and without cause, Defendants discharged Plaintiff from her employment as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky;

7. That Plaintiff satisfactorily performed her job as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky;

8. That at all times complained of herein, Defendant, Wilkinson, was the head of a faction of the Democratic Party of the Commonwealth of Kentucky;

9. That neither during the gubernatorial primary of 1987, nor the gubernatorial general election of 1987 did Plaintiff support the faction of the Democratic Party of which Defendant, Wilkinson, was and is the head;

10. That neither Democratic Party affiliation nor affiliation with the faction of the Democratic Party of which Defendant,

Wilkinson, is the head, is an important requirement for the effective performance of the office of Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky;

11. That on or about February 15, 1988, Defendants caused the position formerly held by Plaintiff to be filled by a member of the faction of the Democratic Party of which Defendant, Wilkinson, is the head;

12. That a substantial or motivating factor for the discharge of Plaintiff by Defendants, as aforesaid, or the sole reason for the discharge of Plaintiff by Defendants, as aforesaid, was her political beliefs;

13. That a substantial or motivating factor for the discharge of Plaintiff by Defendants, as aforesaid, or the sole reason for the discharge of Plaintiff by Defendants, as aforesaid, was the political beliefs of her replacement;

14. That Defendants are persons within the meaning of 42 U.S.C. §1983;

15. That Plaintiff is a citizen of the United States;

16. That the discharge of Plaintiff from her employment by the acts and conduct of the Defendants complained of, subjected Plaintiff to, or caused Plaintiff to be subjected to, the deprivation of rights, privileges, or immunities secured to Plaintiff by the U.S. Constitution, under color of statute, regulation, custom or usage of the Commonwealth of Kentucky;

17. That the 1st and 14th Amendments to the U.S. Constitution secure to the Plaintiff certain rights, privileges or immunities, which includes the protection against discharge from her employment by Defendants, as aforesaid, because of her political beliefs;

18. That by reason of the constitutionally impermissible conduct of the Defendants complained of, Plaintiff has been damaged by reason of having lost earnings, suffered embarrassment, humiliation and mental and emotional distress;

19. That Plaintiff ought to recover compensatory damages of Defendants, and each of them, for the injuries sustained by her, as complained of herein, all in such amounts as the trier of fact may determine are fair and reasonable, as shown by the evidence;

20. That the damages sought herein are in excess of the minimum dollar amount necessary to establish the jurisdiction of this Court;

21. That the conduct of Defendants, Wilkinson and Cowherd, complained of herein was the result of such Defendants' reckless and callous indifference to Plaintiff's federally protected rights under the 1st and 14th Amendments to the U.S. Constitution; that by reason thereof Plaintiff ought to recover of such Defendants exemplary or punitive damages in such amount as the trier of fact may determine is fair and reasonable as shown by the evidence;

22. That Plaintiff ought to be reinstated to her former employment as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky at the level of compensation, including benefits, Plaintiff would have been earning but for the constitutionally impermissible conduct of Defendants, or in the alternative, awarded front-pay in such amount as the trier of fact may determine is fair and reasonable under the evidence;

23. That Plaintiff ought to be awarded, as a part of her costs herein, a reasonable fee for her attorney under 42 U.S.C. §1988;

24. That she demands TRIAL BY JURY.

WHEREFORE, Plaintiff, Patricia A. Mertens, demands:

1. Judgment against the Defendants, and each of them, for compensatory damages;

2. Judgment against Defendants, Wilkinson and Cowherd, in their individual capacities, for exemplary or punitive damages;

3. Judgment reinstating Plaintiff to her former employment as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky at the level of compensation, including benefits, Plaintiff would have been earning but for the constitutionally impermissible conduct of Defendants, or in the alternative, awarded front-pay in such amount as the trier of fact may determine is fair and reasonable under the evidence;

4. A TRIAL BY JURY;

5. Her costs herein, including a reasonable attorney's fee pursuant to 42 U.S.C. §1988; and

6. Any and all other relief to which she may be entitled.

/s/ W. C. Jacobs
WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2464

ATTORNEY FOR PLAINTIFF

I, Patricia A. Mertens, state that I have read the foregoing Complaint and the allegations contained therein are true, as I verily believe.

/s/ Patricia A. Mertens
PATRICIA A. MERTENS

STATE OF KENTUCKY)
COUNTY OF FAYETTE)

Subscribed and sworn to before me by Patricia A. Mertens on this the 20th day of January, 1989.

My Commission expires: June 13, 1989.

/s/ Rheba C. McClellan
NOTARY PUBLIC

FRANKLIN CIRCUIT COURT
CIVIL BRANCH
III DIVISION

PATRICIA A. MERTENS — PLAINTIFF

V. AMENDED COMPLAINT NO. 89-CI-0098

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually, and in his official capacity; HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, and in his official capacity; THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity; FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity — DEFENDANTS

* * * * * * * * * * *

Comes the Plaintiff, Patricia A. Mertens, with leave of Court, for her Amended Complaint herein, and states:

1. That Plaintiff reaffirms and reiterates each and every allegation contained in the original Complaint filed herein;

2. That 42 U.S.C. §1983 provides, in pertinent part:

> **Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ....

3. That the termination of Plaintiff in her employment as Director of Child Support Enforcement was pursuant to the custom of the Commonwealth of Kentucky, constitutionally impermissible under the 1st and 14th Amendments to the U.S. Constitution, whereby unclassified state employees who were not politically allied with the newly elected Governor or his political supporters during the primary or general election are discharged by the newly elected Governor for the purpose of replacing such unclassified state employees with persons who were politically allied with the newly elected Governor or his political supporters during the primary or general election, all without regard to whether political affiliation with the newly elected Governor is an important requirement for the effective performance of the employment from which such unclassified state employee is discharged.

I. Plaintiff's political affiliation with a faction of the Democratic Party not aligned with the Wilkinson faction:

4. That by letter dated March 11, 1987, the immediate predecessor to Defendant, Wallace G. Wilkinson ("Wilkinson"), Governor Martha Layne Collins, gave prior written approval to the appointment of Plaintiff to the post of Director of the Division of Child Support Enforcement in the Department for Social Insurance of the Cabinet for Human Resources of the Commonwealth of Kentucky, effective April 1, 1987; (see, Exhibit A, hereto);

5. That thereby Plaintiff was demonstrably affiliated with the faction of the Kentucky Democratic party of which Governor Collins was then the head;

6. That insofar as elections for Governor of Kentucky are concerned, the Commonwealth of Kentucky has a de facto one-party system, albeit factionalized; that since the end of World War II in 1945, every Governor, with but one exception, has been the person who won the Democratic primary for Governor;

7. That under Ky. Const. §71, Governor Collins was ineligible for election as Governor to the succeeding four years after the expiration of the term for which she had been elected; that there were at least four (4) major candidates for the nomination of the Democratic party in the May 1987 Democratic primary which included Wilkinson, former Governor John Y. Brown, former Gov. Julian M. Carroll, and then Lt. Governor Steven L. Beshear;

8. That a major and much publicized act of Governor Collins during her administration was that of convincing the Japanese automobile manufacturing company, Toyota, to locate a major automobile assembly plant in Scott County, Kentucky; that because a significant portion of the cost of the location of the Toyota plant in Scott County, Kentucky

was to be borne by Kentucky taxpayers, that act was politically controversial;

9. That as a part of his candidacy for the nomination of the Democratic party for Governor, Wilkinson campaigned on that issue, suggesting that too much of the cost of locating the Toyota plant in Scott County, Kentucky was to be borne by Kentucky taxpayers, thereby criticizing Governor Collins politically, although Governor Collins was a member of the Democratic party as was, and is, Wilkinson;

10. That former Governor Collins did not publicly support the candidacy of Wilkinson for the nomination of the Democratic party for Governor of Kentucky;

II. The proper performance by Plaintiff of her state employment antagonized a powerful political ally of Wilkinson:

11. That the Division of Child Support Enforcement is tightly regulated by Federal law and regulations; that the only flexibility that participating states have under the Federal program is that of establishing a state plan of child support enforcement which must be approved by a Federal regulatory body; that failure on the part of any state to operate the child support enforcement program according to the approved state plan and applicable Federal law and regulations can result in either the imposition of fiscal sanctions against the program by the Federal regulatory body, or a disallowance of Federal participation in program expenditures;

12. That during the 1987 election campaign for Governor, the Fayette County Attorney was a political supporter of Wilkinson; that on September 10, 1987, the Lexington Herald-Leader reported that the Fayette County Attorney had endorsed Wilkinson's candidacy for Governor;

13. That the office of the Fayette County Attorney had contracted with the Division of Child Support Enforcement to provide judicial activities for child support enforcement, in return for which the Fayette County Attorney's

office was to be reimbursed a percentage of its administrative costs, and was to be paid, as an incentive, a percentage of the amount of child support collected and reported to the Division;

14. That from April 1987 until her termination as Director of Child Support Enforcement, Plaintiff experienced considerable difficulty in convincing the Fayette County Attorney to adhere to federal policy, and procedures for child support enforcement established by the Division of Child Support Enforcement for the Commonwealth of Kentucky;

15. That the problems referred to above included an audit of reported collections for which the Office of the Fayette County Attorney received back as incentive payments a percentage of collections reported;

16. That as Director of Child Support Enforcement for the Commonwealth of Kentucky, Plaintiff was charged with securing compliance of participating county attorneys of the Commonwealth and other contracting officials, so as not to jeopardize Federal participation in the program; that, in the performance of that duty, significant animosity between Plaintiff and the Fayette County Attorney's office arose, and was ongoing in increasing intensity until Plaintiff's discharge;

17. That Plaintiff is informed, does believe, and therefore alleges that the Fayette County Attorney had at all times pertinent, significant influence on political patronage for the Wilkinson administration with respect to state employment of Fayette County residents seeking state employment;

18. That either, pursuant to an exercise of political influence of the Fayette County Attorney with Wilkinson, or by way of a reward by Wilkinson to the Fayette County Attorney for the political support of Wilkinson by the Fayette County Attorney, as aforesaid, or other political, but constitutionally impermissible reason, Plaintiff was replaced as Director of Child Support Enforcement by George Ewen, Chief

Administrator of the Fayette County Attorney's office, shortly after January 29, 1988, the last date of Plaintiff's employment; that George Ewen was at all times pertinent a political ally of the Fayette County Attorney, as evidenced by the political flyer of George Ewen in connection with George Ewen's candidacy for Fayette County Sheriff, a true copy of which is attached, marked Exhibit B for identification and incorporated herein by reference;

19. That contemporaneous with Plaintiff's termination effective January 29, 1988, by letter dated January 22, 1988 (see, Exhibit C, hereto) Plaintiff was complimented by her immediate superior for Plaintiff's job performance as Director of Child Support Enforcement;

20. That the discharge of Plaintiff, as a "Collins" person, from her employment as Director of Child Support Enforcement for the Cabinet of Human Resources was for the purpose of creating a vacancy in an unclassified position in state government in order that such vacancy could be filled by Defendants, Wilkinson and Cowherd, by a political supporter of Wilkinson, or a political ally of a political supporter of Wilkinson;

21. That in July 1987, Plaintiff was warned by David Cathers, former Director of Child Support Enforcement for the Commonwealth of Kentucky that, by strictly enforcing Division procedures against county attorneys and other contracting officials with political ties to then Democratic nominee for Governor, Wilkinson, Plaintiff was placing her continued employment as Director of Child Support Enforcement for the Commonwealth of Kentucky in jeopardy;

22. That in 1988 Plaintiff was informed by a person whose father had been Wilkinson's county campaign chairman for a far western Kentucky county, that such person had been told in the fall of 1987, that Plaintiff was to be

replaced as Director of Child Support Enforcement for the Commonwealth of Kentucky;

23. That following the primary election of 1987 wherein Wilkinson was chosen Democratic nominee for Governor of Kentucky, Plaintiff frequently discussed with Plaintiff's immediate supervisor, whether action being taken to obtain Fayette County's compliance with federal regulations and procedures would jeopardize Plaintiff's position as Director of Child Support Enforcement; Plaintiff was told that her duty was to operate the Division so as to be answerable to the Kentucky General Assembly;

24. That Wilkinson and Cowherd acted pursuant to the custom mentioned in Numerical Paragraph 3, constitutionally impermissible under the 1st and 14th Amendments to the U.S. Constitution, when discharging Plaintiff, with the unconstitutional motive and intent on their parts, as set out above, to discharge Plaintiff, either because of Plaintiff's political affiliation with a faction of the Democratic party which was not aligned with Wilkinson, or because of political antagonism between Plaintiff and a political supporter and ally of Wilkinson, or to create a vacancy in an unclassified position in state government by discharging Plaintiff, an unclassified employee not politically aligned with Wilkinson or Wilkinson's political supporters, in order to fill such vacancy with a person who was politically aligned with Wilkinson or Wilkinson's political supporters, or for all such reasons;

WHEREFORE, Plaintiff demands judgment as in her original Complaint.

/s/ W. C. Jacobs
WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2464
ATTORNEY FOR PLAINTIFF

I, Patricia A. Mertens, Plaintiff herein state under oath that I have read the foregoing Amended Complaint, and the allegations contained therein are true, as I verily believe.

/s/ Patricia A. Mertens
PATRICIA A. MERTENS

STATE OF KENTUCKY)
COUNTY OF FAYETTE)

Subscribed and sworn to before me by Patricia A. Mertens on this the 7th day of April, 1989.

My Commission expires: June 13, 1989.

/s/ Rheba C. McClellan
NOTARY PUBLIC

CERTIFICATE OF SERVICE

This is to certify that the foregoing Amended Complaint was served on Defendants by mailing a true copy of same to their attorney of record, Hon. Trisha Z. James, Cabinet for Human Resources, Office of the Counsel, 275 East Main Street - 4 West, Frankfort, Kentucky 40621, on this the 7th day of April, 1989.

/s/ W. C. Jacobs
ATTORNEY FOR PLAINTIFF

Supreme Court, U.S.
FILED
AUG 7 1992
OFFICE OF THE CLERK

No. 92-96

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PATRICIA A. MERTENS - - - - Petitioner

versus

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually and in his official capacity;
HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, in his official capacity;
THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity;
FRANK WILLEY (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity - - - - - - - - Respondents

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COMMONWEALTH OF KENTUCKY
CABINET FOR HUMAN RESOURCES
By: TRISHA ZELLER JAMES
Department of Law
275 East Main Street, 4-W
Frankfort, KY 40621
Assistant General Counsel

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY

QUESTIONS PRESENTED FOR REVIEW

Did Kentucky's narrowly taylored patronage practice impermissibly discriminate against the Petitioner where such practice furthers a vital government interest by retaining only those high level policy making officials who will loyally implement the policies of a duly elected administration?

Does the choice of state forum eliminate the heightened pleading requirements of claims brought under 42 USC § 1983?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iii-iv
Counterstatement of the Case	2– 5
Reasons for Denying the Writ	5–16
I. The Kentucky Supreme Court Correctly Applied *Rutan* v. *Illinois* Which Recognized That There Is a Vital Government Interest in Retaining Only Those High-Level, Policy-Making Officials Who Will Loyally Implement the Policies of a Duly Elected Administration	6– 8
II. The Kentucky Supreme Court Held that where Petitioner Failed to Set Forth Non-Conclusory Allegations of Respondent's Discriminatory Intent, She Failed to State a Cause of Action Under the Heightened Pleading Requirements of 42 USC § 1983	8–16
Conclusion	16
Appendix	1a–10a

TABLE OF AUTHORITIES

PAGE

Cases:

Ana Leon T. v. *Federal Reserve Bank of Chicago*, 823 F.2d 928, 930 (6th Cir. 1987), *cert. denied* 108 S.Ct. 333 (1987) 9

Blackburn v. *Fisk University*, 443 F.2d 121, 124 (6th Cir. 1971) 9

Branti v. *Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) 4, 6, 7, 8

Chapman v. *City of Detroit*, 808 F.2d 459 (6th Cir. 1986) 9, 16

Douglas v. *City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943) 8, 9

Elrod v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) 4, 6, 7, 8

Estelle v. *Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976) 13

Farah v. *Martin*, 122 F.R.D. 24, 26 (E.D. Mich. 1988) 9

Grant v. *Hollenbach*, 870 F.2d 1135, 1138 (6th Cir. 1989) 9

Haas v. *Berrien County Sheriff's Department*, 658 F.Supp. 877 (W.D. Mich. 1987) 10,11

Hall v. *Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978) 12

Harlow [v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)] 10

Hobson v. *Wilson*, 737 F.2d at 29. (D.C. Cir. 1984) 10, 11, 15

Kirkpatrick, Defining a Constitutional Tort Under Section 1983; The State-of-Mind Requirement, 46 U. Cin.L.Rev. 45 (1977) 14

Leatherman v. *Tarrant County, Texas*, 954 F.2d 1054 (5th Cir. 1992), *cert. granted* 60 L.W. 3851, June 23, 1992 6

PAGE

Martin v. *D.C. Metropolitan Police Department*, 812 F.2d 1425, 1433 (D.C. Cir. 1987), upon reh'g en banc vacated as to 1434 et seq. only 817 F.2d 144 (1987), and reinstated reh'g dismissed on reconsideration, en banc 824 F.2d 1240 (1987) 14

Place v. *Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971) 9

Poe v. *Hayden*, 853 F.2d 418 (6th Cir. 1988) 9, 10

Rutan v. *Republican Party of Illinois*, 497 U.S. 62, 100 S.Ct. 2729, 2737 (1990) 4, 5, 6

Smith v. *Rose*, 760 F.2d 102, 106 (6th Cir. 1985) .. 16

Tanner v. *McCall*, 625 F.2d 1183, 1193 (5th Cir. 1980) 10

Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose In Civil Rights Litigation, 95 YALE 134-36 (1985) 14

Washington v. *Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976) 13

Wayne v. *United States*, 470 U.S. 598, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985) 13

Windsor v. *The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 105 S.Ct. 105 (1984) 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PATRICIA A. MERTENS - - - - - - - *Petitioner*

v.

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually and in his official capacity;
HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, in his official capacity;
THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity;
FRANK WILLEY (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity - - - - - - - - - *Respondents*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Kentucky entered January 16, 1992 in Case No. 90-SC-778-DG. That Opinion is unpublished.

COUNTERSTATEMENT OF THE CASE

Respondents, Cabinet for Human Resources, et al., agree in substance with Petitioner's procedural history of the case.

Petitioner, Patricia A. Mertens, was indeed hired by the Commonwealth of Kentucky April 1, 1987, pursuant to KRS 12.050, as the Division Director of Child Support Enforcement for the Cabinet for Human Resources. There was no employment contract. By statute [KRS 18A.115(i)] the position of division director is unclassified, unless certified for classification pursuant to KRS 18A.170. Mertens admitted in her complaint that her position was unclassified.

An individual holding an unclassified position is subject to dismissal upon written notice by the appointing authority ". . . for cause, or without cause." 101 KAR 3:050(3). Mertens admitted in her complaint that her dismissal on January 22, 1988 was without cause.

On January 20, 1989, almost a year after her dismissal "without cause", Mertens filed this action pursuant to 42 USC § 1983 in Franklin Circuit Court alleging violation of her constitutional rights under the First and Fourteenth Amendments. Specifically, she alleged in her original complaint that "a substantial or motivating factor . . . or the sole reason for the discharge of plaintiff by defendant . . . was her political beliefs."

Based on the heightened pleading requirements of actions brought pursuant to 42 USC § 1983, whether in federal or state court, the Franklin Circuit Court dismissed Mertens original complaint with leave to amend "to state non-conclusory allegations of evidence of unconstitutional

motive or intent." In her amended complaint she alleged "unconstitutional motive and intent." Mertens' subsequent complaint, although lengthy, again failed "to state a claim in terms of facts rather than conclusions," and on such basis was dismissed. Petitioner's motion to reconsider pursuant to CR 59.05 was denied. Petitioner appealed.

The Kentucky Court of Appeals decision was in three parts. First of all the appellate court upheld the circuit court's dismissal of Mertens' action for damages against the individual defendants in their official capacity, while holding that an action for injunctive relief against defendants was proper under § 1983.

The Court then analyzed the statutory scheme and held that Mertens' only option in appealing a dismissal without cause was an action in Franklin Circuit Court; Respondent's original argument that Mertens failed to exhaust administrative remedies was held to be without merit. It should be noted that Mertens' state court action was not, however, merely an appeal of the dismissal, but a separate action under 42 USC § 1983 alleging constitutional violations.

In the third part of its decision the Court of Appeals addressed the crux of the case before this Court on review and held that "[t]he requirements for asserting constitutional deprivations in § 1983 claims are the same for [sic] those establishing the underlying constitutional violations." Where Petitioner asserted deprivation of freedom of speech, she failed to assert "any conduct, speech, or belief that was constitutionally protected, nor [did she show] that the Respondents decided to dismiss her because of any such conduct." On this basis the Court of Appeals upheld dismissal of Mertens' complaint for failure to state a claim.

The Supreme Court of Kentucky granted discretionary review, but on January 16, 1992 affirmed the Court of Appeals. In pertinent part the Supreme Court held:

> It is clear that the First Amendment forbids discharge of public employees solely for not being supporters of the political party in power, *unless party affiliation is an appropriate requirement for the position involved. Rutan* v. *Illinois*, ___ *U.S.* ___, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), *Branti* v. *Finkel, supra; Elrod* v. *Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Moreover, the U.S. Supreme Court stated in *Rutan* that a government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high level employees on the basis of their political views. S.Ct. at 2737, L.Ed.2d at 66, citing *Elrod* v. *Burns, supra.*
>
> We believe it is clear that Mertens' position, Division Director of Child Support Enforcement, is a significant, high-level position in the state government system. Only the Commissioner for Social Insurance and the Secretary of the Cabinet for Human Resources are closer to the Governor in the ranking system. It also involves supervisory duties of more than two hundred employees. The civil service laws embodied in Kentucky's statutory system clearly define the position as "policy-making." Division directors who are considered policy makers are not certified. If a division director disagrees, a hearing is held. The Division Director of Child Support Enforcement is not a certified position. Clearly, it is in choosing or dismissing individuals at this high-level of service that enables an administration to further the goals and implement the policies for which it was elected.
>
> There is no merit in Mertens' contention that *Branti* v. *Finkel, supra,* compels a different result. The plaintiffs in *Branti* held only entry level positions. None of

> the political patronage cases cited by Mertens dealt with high level office involved here.

As to the argument put forth by Mertens that because her § 1983 case was brought in state, rather than federal court, the heightened pleading requirements of actions brought under § 1983 need not be met, the Kentucky Supreme Court held:

> We do not agree. Pleading in federal courts, as in this Commonwealth, is notice pleading. It is only in actions brought pursuant to § 1983, where motive is the issue, that heightened pleading standards are mandated. The mere fact that state court claims do not require pleading with specificity is totally irrelevant to the issue of a § 1983 pleading.

REASONS FOR DENYING THE WRIT

Nowhere does Petitioner present a legitimate constitutional claim. She asserts that her constitutional rights were violated when the new Governor replaced her as Division Director of Child Support Enforcement with one of his political supporters. Her allegations are merely conclusive, not factual, and fail to meet the heightened pleading requirement of § 1983 actions.

In denying Petitioners claims, the Kentucky Supreme Court properly applied the principles of *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 100 S.Ct. 2729, 2737 (1990) in holding that the state has a vital interest in being able to choose or dismiss certain high level officials on the basis of their political views. The Kentucky Court also properly interpreted federal law in ruling that Petitioner's complaint failed to state a cause of action under the heightened pleading requirements of 42 USC § 1983. It should be noted, however, that this Court has

granted a writ of certiorari on the question of heightened pleading requirements in § 1983 actions: *Leatherman* v. *Tarrant County, Texas*, 954 F.2d 1054 (5th Cir. 1992), *cert. granted* 60 L.W. 3851, June 23, 1992.

I.

The Kentucky Supreme Court Correctly Applied *Rutan* v. *Illinois* Which Recognized That There Is a Vital Government Interest in Retaining Only Those High-Level, Policy-Making Officials Who Will Loyally Implement the Policies of a Duly Elected Administration.

Petitioner has maintained throughout the lengthy state court process that she is entitled to relief by proving, inter alia, that she was "demonstrably affiliated" with that faction of the Kentucky Democratic Party headed by a former Governor, Martha Layne Collins, a faction which allegedly did not support the subsequent Governor, Wallace G. Wilkinson, in his election, and that her termination was pursuant to a custom of the Commonwealth of Kentucky whereby unclassified employees, who are not politically allied with the newly elected Governor, are dismissed. This was, in essence, her complaint, that she was discharged from office because of political affiliation, yet this is precisely the practice that has been recognized and sanctioned, succinctly and successively by this Court:

> A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views. *Rutan* v. *Republican Party of Illinois*, ___ U.S. ___, 100 S.Ct. 2729, 2737 (1990); citing *Elrod* v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed. 2d 547 (1976), and *Branti* v. *Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

There is no doubt that the office formerly held by Petitioner, that of Division Director of Child Support Enforcement, is a significant, high-level position in Kentucky's government hierarchy. Not only is it just three levels removed from the Governor[1], but it entails supervisory duties of well over 200 employees. Further, the civil service laws embodied in Kentucky's statutory scheme clearly define the position as "policy-making", and therefore non-classified (or non-merit).[2]

In *Elrod* v. *Burns, supra,* this Court held that a government can meet its need for politically loyal employees to implement policies by dismissing those employees in policy making positions. While *Branti* v. *Finkel* seemed to narrow the holding of *Elrod* by indicating that the mere label of "policy making" or "confidential" is insufficient to hold, afortiori, that a position is not protected from political dismissal, both *Branti* and subsequently *Rutan* upheld patronage dismissal where the hiring authority can show political and ideological affiliation to be an appropriate

---

[1]The governmental hierarchy is: the Governor, the Secretary of the Cabinet for Human Resources, the Commissioner for Social Insurance, and the Division Director for Child Support Enforcement.

[2]While division director is statutorily defined as a non-classified, policy-making position there is a procedure, for review and classification where the duties of a particular division director are non-policy making in nature. [KRS § 18A.170] The position of Division Director of Child Support Enforcement has never been classified (or merit), and was certainly not classified when held by Petitioner. An individual in this office who is not politically and ideologically aligned with the Governor is certainly in a position to derail important administrative goals in the area of child support. (It is notable that child support issues have recently played a significant role in Kentucky's gubernatorial politics).

requirement for effective performance of the public office involved. None of these cases dealt with the high-level office at issue here. In *Elrod* this Court decided that a Democratic sheriff could not replace members of his office staff with members of his own party. In *Branti* this Court held that a newly *appointed* public defender could not discharge assistant public defenders for public affiliation. *Rutan* involved two low-level state employees, a rehabilitation counselor and a road equipment operator, a job-applicant, and two individuals who had not been recalled after layoffs. While the *Branti* plaintiffs alleged supervisory case responsibility of individual legal files, none of these petitioners held more than entry-level positions; none had personnel supervisory duties. As outlined above, the Division Director of Child Support Enforcement is far from entry-level. It is statutorily defined as an unclassified, policy making position, just three levels removed from the Governor, with supervisory duties for a staff of well over 200 entry-level and other classified, or merit, employees. Clearly it is in choosing or dismissing individuals at this high-level of services that enables an administration to further the goals and implement the policies for which it was elected.

II.

The Kentucky Supreme Court Correctly Held that where Petitioner Failed to Set Forth Non-Conclusory Allegations of Respondent's Discriminatory Intent, She Failed to State a Cause of Action Under the Heightened Pleading Requirements of 42 USC § 1983.

In order to state a cause of action under 42 USC § 1983 the Petitioner must have alleged that Respondent, acting under color of law, deprived her of some right, privilege or immunity secured by the Constitution. *Douglas* v. *City of*

Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943); *Poe* v. *Hayden,* 853 F.2d 418 (6th Cir. 1988).

In ruling on a motion to dismiss a court must accept as true all well-pleaded factual allegations in the complaint. [see *Windsor* v. *The Tennessean,* 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied,* 105 S.Ct. 105 (1984)]; however, the Court need not accept as true plaintiff's legal conclusions or unwarranted factual inferences. *Blackburn* v. *Fisk University,* 443 F.2d 121, 124 (6th Cir. 1971).

Indeed, to be sufficient to state a civil rights claim, "the allegations must be more than mere conclusions", *Ana Leon T.* v. *Federal Reserve Bank of Chicago,* 823 F.2d 928, 930 (6th Cir. 1987), *cert. denied* 108 S.Ct. 333 (1987), for the Court is "not bound by allegations that are clearly unsupported and unsupportable". *Place* v. *Shepherd,* 446 F.2d 1239, 1244 (6th Cir. 1971). See also: *Grant* v. *Hollenbach,* 870 F.2d 1135, 1138 (6th Cir. 1989).

In *Chapman* v. *City of Detroit,* 808 F.2d 459 (6th Cir. 1986) the Sixth Circuit held that:

> There is a sound reason for requiring that a civil rights action against a government official or employee *state a claim in terms of facts rather than conclusions.* When a government employee is sued, if no factual allegations are made, discovery and perhaps even trial may be required to demonstrate that the claim has no merit. Such activities require the government defendant and others such as government attorneys involved in defense of the claim to divert their attention from their usual activities and to become involved in the litigation to the neglect of their assigned duties. *Id.* at 465 (Emphasis provided).
>
> See also: *Farah* v. *Martin,* 122 F.R.D. 24, 26 (E.D. Mich. 1988), which cites *Chapman.*

In evaluating allegations of wrongful discharge in a § 1983 action the defendant's motive must be ascertained. *Tanner* v. *McCall,* 625 F.2d 1183, 1193 (5th Cir. 1980). The act itself—the act of discharge—is neutral; it is the motive or intent that makes the act both actionable and violative of clearly established law. *Poe* v. *Hayden,* 853 F.2d 418 (6th Cir. 1988).

In ascertaining motive in such cases, courts have consistently required more than a mere claim of the defendant's discriminatory intent.

> For section 1983 actions, however, *particularly those that implicate* concerns of official immunity [i.e. intent, motive or purpose], courts have established a standard of pleading that requires more detailed factual allegations than those required by the general "notice" pleading standard. As the Fifth Circuit recently stated, "[i]n the now familiar cases invoking 42 USC § 1983 we consistently require the claimant to state specific facts, not mere conclusory allegations.
>
> *Haas* v. *Berrien County Sheriff's Department,* 658 F.Supp. 877 (W.D. Mich. 1987). (Emphasis provided).

In the case of *Hobson* v. *Wilson,* 737 F.2d 1 (D.C. Cir. 1984), cited in *Poe* v. *Hayden,* 853 F.2d at 432, the D.C. Circuit held:

> *Harlow* [v. *Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)] focused on the need to enable courts to dismiss "insubstantial" lawsuits before discovery and trial, and it adjusted the qualified immunity defense to facilitate that goal. The kind of case we confront today, *involving allegations of unconstitutional motive,* offers to litigants a possible means to circumvent the new rule, simply by pleading that any act was performed with an intent to violate clearly established constitutional rights and thereby surmounting the threshold test set out in *Harlow.* We

> recognize that in some instances, plaintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive and as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits. The result would be precisely the burden *Harlow* sought to prevent. *Accordingly, in cases involving a claim that defendants acted with an unconstitutional motive, we will require that nonconclusory allegations of evidence of such intent must be present in a complaint for litigants to proceed to discovery on the claim. Hobson* v. *Wilson,* 737 F.2d 1, 29 (D.C. Cir. 1984). (Emphasis provided).

Similar reasoning has been applied by District Courts in the Sixth Circuit in § 1983 actions implicating official immunity [i.e. intent, motive or purpose], and a higher more stringent standard of pleading than mere "notice" pleading, has been imposed. See, e.g. *Haas* v. *Berrien County Sheriff's Department,* 658 F. Supp. 877 (W.D. Mich. 1987), quoted *supra.* Moreover, every other circuit has followed suit in requiring that civil rights complaints be pleaded with at least a minimum of specificity.[3] This pleading requirement has been interpreted to mean that a

---

[3]See: *Dartmouth Review* v. *Dartmouth College,* 889 F.2d 13, 16 (1st Cir. 1989); *Dewey* v. *University of N.H.,* 694 F.2d 1, 3 (1st Cir. 1982), *cert. denied,* 461 U.S. 944 (1983); *Hurney* v. *Carver,* 602 F.2d 993, 995 (1st Cir. 1979) (court need not "conjure up" unpled facts to support conclusory allegations); *Fisher* v. *Flynn,* 598 F.2d 663, 665 (1st Cir. 1979) (civil rights complaint must do more than state simple conclusions); *Sherma* v. *Yakahi,* 549 F.2d 1287 (1st Cir. 1977); *Salahuddin* v. *Cuomo,* 861 F.2d 40, 42 (2d Cir. 1988); *Fonte* v. *Board of Managers,* 848 F.2d 24 (2d Cir. 1988); *Alfaro Motors* v. *Ward,* 814 F.2d 883 (2d Cir. 1987); *Barr* v. *Abrams,* 810 F.2d 358 (2d Cir. 1987); *Martin* v. *Merola,* 532 F.2d 191 (2d Cir. 1976); *Fine* v. *City of N.Y.,* 529 F.2d 70 (2d Cir. 1975);

(continued on next page)

plaintiff must allege the manner in which his rights were violated, the time, the place, and those responsible. *Hall* v. *Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978). Plaintiffs must present nonconclusory allegations containing evidence of unlawful intent in their complaint or the case should be dismissed prior to the taking of any discovery.

(footnote continued from preceding page)

Albany Welfare Rights Org. Day Care Center v. *Schreck*, 463 F.2d 620 (2d Cir. 1972); *Rose* v. *Bartle*, 871 F.2d 331 (3d Cir. 1989); *Freedman* v. *City of Allentown*, 853 F.2d 1111 (3d Cir. 1988); *Colburn* v. *Upper Darby Township*, 838 F.2d 663 (3d Cir. 1988); *District Council 47* v. *Bradley*, 795 F.2d 310 (3d Cir. 1986); *Pace Resources* v. *Shersbury Township*, 808 F.2d 1023 (3d Cir.), *cert. denied*, 107 S.Ct. 2482 (1987); *Frazier* v. *Southeastern Pa. Transp. Auth.*, 785 F.2d 658 (3d Cir. 1986); *Bartholomew* v. *Fischl*, 782 F.2d 1148 (3d Cir. 1986); *Ross* v. *Meagan*, 638 F.2d 646 (3d Cir. 1981); *Rotolo* v. *Borough of Charleroi*, 532 F.2d 920 (3rd Cir. 1976). *Hall* v. *Pennsylvania State Police*, 570 F.2d 86, 89 (3rd Cir. 1978) (complaint must be sufficiently precise to give notice of claims asserted); *Reeves* v. *Charles County*, 882 F.2d 870 (4th Cir. 1989); *Ogilbee* v. *Western Dist. Guidance Center*, 658 F.2d 257 (4th Cir. 1981); *Smith* v. *International Longshoremen's Ass'n.*, 592 F.2d 225, 226 (4th Cir. 1979) (Federal Rules of Civil Procedure, Rule 8(a) and (e), require definiteness in complaint); *Wetherington* v. *Phillips*, 526 F.2d 591 (4th Cir. 1975), aff'g mem., 380 F.Supp. 426, 428 (E.D.N.C. 1974) (failure to allege facts showing constitutional deprivation leads to dismissal); *Lewis* v. *Woods*, 848 F.2d 649 (5th Cir. 1988); *Palmer* v. *San Antonio*, 810 F.2d 514 (5th Cir. 1987); *Jacquez* v. *Procunier*, 801 F.2d 789 (5th Cir. 1986); *Morrison* v. *Baton Rouge*, 761 F.2d 242 (5th Cir. 1985); *Elliott* v. *Perez*, 751 F.2d 1472 (5th Cir. 1985); *Jewell* v. *Covington, Ga.*, 425 F.2d 459, 460 (5th Cir. 1970) (general conclusory allegations unsupported by any facts do not constitute cause of action), *cert. denied*, 400 U.S. 929, 91 S.Ct. 195, 27 L.Ed.2d 189 (1970); *Chapman* v. *Detroit*, 808 F.2d 459 (6th Cir. 1986); *Place* v. *Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971) (pleading is not sufficient to state cause of action under Civil Rights Act "if its allega-

(footnote continued on next page)

A government official's motive or purpose is often an essential element of plaintiff's *prima facia* constitutional claim. *See, e.g., Washington* v. *Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976) (discriminatory intent required to establish violation of equal protection guarantee); *Estelle* v. *Gamble,* 429 U.S. 97, 104-05, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976) ("deliberate indifference" required to show violation of prohibition against cruel and unusual punishment); *Wayne* v. *United States,* 470 U.S. 598, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985) (selective prosecution claim must be supported by evidence of discriminatory purpose). *See generally Note, Quali-*

(footnote continued from preceding page)

tions are but conclusions"); *Cohen* v. *Illinois Inst. of Technology,* 581 F.2d 658, 663 (7th Cir. 1978) (some particularized facts demonstrating a constitutional deprivation are needed to sustain cause of action under Civil Rights Act), *cert. denied,* 439 U.S. 1135, 99 S.Ct. 1058, 59 L.Ed.2d 97 (1979); *Arnold* v. *Jones,* 891 F.2d 1370, 1373 n.3 (8th Cir. 1989); *Nickens* v. *White,* 536 F.2d 802, 803 (8th Cir. 1976) (civil rights pleadings must not be conclusory); *Anderson* v. *Sixth Judicial Dist. Court,* 521 F.2d 420 (8th Cir. 1975); *Jones* v. *Community Redev. Agency,* 733 F.2d 646 (9th Cir. 1984); *Keniston* v. *Roberts,* 717 F.2d 1295 (9th Cir. 1983); *Uston* v. *Airport Casino, Inc.,* 564 F.2d 1217 (9th Cir. 1977) (complaint must contain specific factual allegations to support claim of conspiracy); *Kennedy* v. *H.M. Landing,* 529 F.2d 987 (9th Cir. 1976); *Williams* v. *Gorton,* 529 F.2d 668 (9th Cir. 1976); *Dunn* v. *White,* 800 F.2d 1188, 1198 (10th Cir. 1989); *Wise* v. *Bravo,* 666 F.2d 1328 (10th Cir. 1981); *Coopersmith* v. *Supreme Court,* 465 F.2d 993, 994 (10th Cir. 1972) (under federal rules, complaint must state factual basis for claim asserted); *Arnold* v. *Board of Educ.,* 880 F.2d 305, 310 (11th Cir. 1989); *Fullman* v. *Graddick,* 739 F.2d 553, 556-57 (11th Cir. 1984); *Martin* v. *D.C. Metropolitan Police Department,* 812 F.2d 1425, 1433 (D.C. Cir. 1987) upon reh'g en banc vacated as to 1434 et seq., only, 817 F.2d 144 (1987), and reinstated, reh'g dismissed on reconsideration, en banc, 824 F.2d 1240 (1987); *Hobson* v. *Wilson,* 737 F.2d 1, 30 (D.C. Cir. 1984), *cert. denied sub nom. Brennan* v. *Hobson,* 470 U.S. 1084 (1985).

fied Immunity for Government Officials: The Problem of Unconstitutional Purpose In Civil Rights Litigation, 95 YALE ___-126, 134-36 (1985); *Kirkpatrick, Defining a Constitutional Tort Under Section 1983; The State-of-Mind Requirement,* 46 U. Cin.L.Rev. 45 (1977).

Martin v. *D.C. Metropolitan Police Department,* 812 F.2d 1425, 1433 (D.C. Cir. 1987), ftnt. 17, upon reh'g en banc vacated as to 1434 et seq. only 817 F.2d 144 (1987), and reinstated reh'g dismissed on reconsideration, en banc 824 F.2d 1240 (1987).

In the case at bar Petitioner, has stated that she was placed in the office of Division Director of Child Support by a former Governor, Martha Layne Collins. She then states that when Governor Collins was succeeded by Governor Wilkinson, he replaced her with a member of his "political faction." Mertens does not allege that she supported anyone in the Democratic primary or that she opposed the "Wilkinson faction" of the Democratic Party. There is no allegation that she publicly criticized the Wilkinson administration, much less that she was replaced for such criticism. Certainly the privacy of the voting booth was not violated.

The law is clear that the heightened pleading standards required of claims brought under 42 USC § 1983 demand that allegations be more than mere conclusions or unwarranted factual inferences. By tortuous, if not blatantly fallacious, reasoning Petitioner asks this Court to recognize that Collins did not support Wilkinson, to then assume that because Collins placed Mertens, Mertens did not support Wilkinson and, therefore, to conclude that Mertens' dismissal was a wrongful violation of her First Amendment rights. The Circuit Court was quite thorough in its analysis of Mertens' claim in its Order of June 20, 1989:

> . . . This Court is aware that there are certain nebulae in the protection of the Constitution. This Court does, however, require that Plaintiff outline the contours of something that is discernible in the mist. Even after having been given leave to file an Amended Complaint and having been made aware of this Court's requirement that heightened pleading requirements be met in order to state a claim, Plaintiff has not done so. The Court will not attempt to detail the leaps of logic and flights of fancy that would be required in order to find a claim stated here. Let us simply state that the Court does not feel compelled to *assume* along with Plaintiff, that others acted under the influence of unconstitutional motives when the few facts presented lend themselves just as easily to interpretations that carry no constitutional violation. Further the Court does not feel compelled to *assume* that a position of Division Director is not a policy making position when Plaintiff has provided nothing other than her own *conclusions* to refute the presumption created by the statutory inclusion of division director positions in the unclassified service. (Emphasis provided).

By statute, the position formerly held by Mertens, that of Division Director, is unclassified [KRS 18A.115(i)], the person holding such being subject to dismissal upon written notice by the appointing authority. ". . . for cause or without cause." 101 KAR 3:050(3). In stating her case, Petitioner merely appended a claim that such discharge was done with unconstitutional motive. See: *Hobson* v. *Wilson*, 737 F.2d at 29. (D.C. Cir. 1984)

Finally, pleading in federal courts, as in this Commonwealth, is notice pleading. It is only in actions brought pursuant to 42 USC § 1983, where motive is the issue, *i.e.* unjust dismissal, that heightened pleading standards are mandated. This federal statute creates a substantive right and, in pleading such, federal substantive as well as proce-

dural law is applicable. The mere fact that state court claims do not require pleadings with specificity is totally irrelevant to the issue of § 1983 pleading.

Clearly, Petitioner failed to state a claim under the heightened requirements of civil rights actions as set forth herein. This failure supports dismissal of the complaint. *Chapman* v. *City of Detroit, supra;* cf. *Smith* v. *Rose,* 760 F.2d 102, 106 (6th Cir. 1985).

CONCLUSION

For the reasons stated above, Respondents pray that this Court deny the Petitioner for Writ of Certiorari.

Respectfully submitted,

COMMONWEALTH OF KENTUCKY
CABINET FOR HUMAN RESOURCES

BY:_____

TRISHA ZELLER JAMES
Department of Law
275 East Main Street, 4-W
Frankfort, KY 40621
Assistant General Counsel

APPENDIX

[EXCERPTS FROM KENTUCKY REVISED STATUTES]

18A.005. Definitions for KRS 18A.010 to 18A.200.— As used in this chapter, unless the context indicates otherwise:

(1) "Appointing authority" means the agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employ appointments, position establishments, payroll documents, register requests, waiver requests, requests for certification or other position actions. Such designation shall be in writing and signed by both the agency head and his designee. Prior to the exercise of appointing authority, such designation shall be filed with the commissioner;

(2) "Base salary or wages" means the compensation to which an employe is entitled under the salary schedules adopted pursuant to the provisions of KRS 18A.030 and 18A.110. Base salary or wages shall be adjusted as provided under the provisions of KRS 18A.355 and 48.130;

(3) "Board" means the personnel board created by KRS 18A.045;

(4) "Career employe" shall mean a state employe with sixteen (16) or more years of permanent full-time state service, or the part-time employment equivalent of at least sixteen (16) years of full-time state service. The service may have been in the classified service, the unclassified service, or a combination thereof;

(5) "Certification" means the referral of the name of one (1) or more qualified prospective employes by the commissioner on request of an appointing officer for consideration in filling a position in the classified service;

(6) "Class" means a group of positions sufficiently similar as to duties performed, scope of discretion and re-

sponsibility, minimum requirements of training, experience, or skill, and such other characteristics that the same title, the same tests of fitness, and the same schedule of compensation have been or may be applied to each position in the group;

(7) "Classified service" includes all the employment subject to the terms of this chapter except for those positions expressly cited in KRS 18A.115; a "classified position" is a position in the classified service;

(8) "Commissioner" means the commissioner of the department of personnel as provided for in KRS 18A.015;

(9) "Demotion" means a change in the rank of an employe from a position in one (1) class to a position in another class having a lower minimum salary range or less discretion or responsibility;

(10) "Department" means the department of personnel provided for in KRS 18A.015, unless the context indicates otherwise;

(11) "Eligible" refers to a person who has made a passing score on any examination required under KRS 18A.010 to 18A.200 and who has qualified to be placed on a register;

(12) "Emergency employe" means an employe appointed without regard to the examination requirements of KRS 18A.010 to 18A.200 to any position by reason of a governmental emergency. An emergency appointment shall not exceed thirty (30) working days in duration and is nonrenewable;

(13) "Employe" means a person regularly appointed to a position in the state service for which he is compensated on a full-time or part-time basis;

(14) "Federally funded time-limited employe" means an employe appointed to a federally funded time-limited

position and, except as provided in KRS 18A.115, may in all other respects be entitled to the benefits provided permanent, full-time regular employes as defined in this chapter;

(15) "Federally funded time-limited position" means a position created for the specific purpose of providing public service employment or one-time special or research project services for a limited period of time and shall not exceed the period of time for which that special federal funding is provided;

(16) "Initial probation" means the period of service following initial appointment to any position under KRS 18A.010 to 18A.200 which requires special observation and evaluation of an employe's work and which must be passed successfully before status may be conferred as provided in KRS 18A.110 and by the provisions of this chapter. If the appointee is granted leave in excess of twenty (20) consecutive work days during this period, his initial probation shall be extended for the same length of time as the granted leave to cover such absence. "Initial probation" does not include probationary period served by a laid-off employe who accepts a bona fide written offer of appointment;

(17) "Penalization" shall include, but not be limited to, demotion, dismissal, suspension, fines and other disciplinary actions, involuntary transfers; salary adjustments; any action that diminishes the level, rank, discretion or responsibility of an employe without proper cause, including a reclassification or reallocation; and the abridgement or denial of other rights granted to state employes;

(18) "Position" means an office or employment in an agency (whether part-time, full-time, permanent, temporary, seasonal, federally funded time-limited, or emergency, occupied or vacant) involving duties requiring the services of one (1) person;

(19) "Promotion" means a change of rank of an employe from a position in one (1) class to a position in another class having a higher minimum salary or carrying a greater scope of discretion or responsibility;

(20) "Promotional probation" means the six (6) month period of service following the promotion of an employe with status which must be successfully completed in order for the employe to retain the position to which he has been promoted. If the employe is granted leave in excess of twenty (20) consecutive work days during this period, his promotional probation shall be extended for the same length of time as the granted leave to cover such absence;

(21) "Provisional employe" means any employe appointed on a temporary or interim basis to permanent position under KRS 18A.010 to 18A.200 without examination, such appointment being made necessary by the absence of a register for the position involved and by the time limitations and prohibition on renewal as defined in KRS 18A.110(5)(h);

(22) "Reallocation" means the correction of the classification of an existing position by placement of the position into the classification that is appropriate for the duties the employe has been and shall continue to perform;

(23) "Reclassification" shall mean the change in the classification of an employe when a material and permanent change in the duties or responsibilities of that employ occurs;

(24) "Reemployment" shall mean the rehiring of an employe with status who has been laid off;

(25) Reemployment register" means the separate list of names of persons who have been separated from state service by reason of layoff. Reemployment registers shall be used as provided by the provisions of KRS 18A.110, 18A.130, and 18A.135;

(26) "Register" means any official list of eligibles for a particular class and, except as provided in this chapter, placed in rank order according to the examination scores maintained for use in making original appointments or promotions to positions in the classified service;

(27) "Reinstatement" shall mean the restoration of an employe who has resigned in good standing, or who has been ordered reinstated by the board or a court to a position in his former class, or to a position of like status and pay;

(28) "Seasonal employe" means an employe appointed to a seasonal position;

(29) "Seasonal position" means a position that is temporary, coincides with a particular season or seasons of the year, and does not exceed eleven (11) months' duration;

(30) "Seniority" mean the total number of months of state service;

(31) "Status" means the acquisition of tenure with all rights and privileges granted by the provisions of this chapter after satisfactory completion of the initial probationary period by an employe in the classified service;

(32) "Temporary employe" means an employe appointed to a temporary position;

(33) "Temporary position" means a position that is created for a definite period of time not to exceed six (6) months and not renewable;

(34) "Transfer" means a movement of any employe from one (1) position to another of the same grade having the same salary ranges, the same level of responsibility within the classified service and the same salary received immediately prior to transfer. (Repealed, reenact. and amend. 1982, ch. 448, § 1, effective July 15, 1982; 1986, ch. 494, § 7, effective July 15, 1986; 1988, ch. 129, § 1, effective July 15, 1988; 1988, ch. 203, § 1, effective July 15, 1988.)

* * * * * * *

18A.115. Employment exempted from classified service—Reversion rights of career employes promoted outside classified service.—

(1) The classified service to which KRS 18A.005 to 18A.200 shall apply shall comprise all positions in the state service now existing or hereafter established, except the following:

(a) The general assembly and employes of the general assembly including the employes of the legislative research commission;

(b) Officers elected by popular vote and persons appointed to fill vacancies in elective offices;

(c) Members of boards and commissions;

(d) Officers and employes on the staff of the governor, the lieutenant governor, the office of the secretary of the governor's cabinet, and the office of program administration;

(e) Cabinet secretaries, commissioners, office heads, and the administrative heads of all boards and commissions, including the executive director of Kentucky Education Television;

(f) Employes of Kentucky Educational Television who have been determined to be exempt from classified service by the Kentucky Authority for Educational Television, which shall have sole authority over such exempt employes for employment, dismissal and setting of compensation, up to the maximum established for the executive director and his principal assistants;

(g) One (1) principal assistant or deputy for each person exempted under subsection (1)(e) of this section;

(h) One (1) additional principal assistant or deputy as may be necessary for making and carrying out policy for each person exempted under subsection (1)(e) of this sec-

tion in those instances in which the nature of the functions, size or complexity of the unit involved are such that the commissioner approves such an addition on petition of the relevant cabinet secretary or department head and such other principal assistants, deputies, or other major assistants as may be necessary for making and carrying out policy for each person exempted under subsection (1)(e) of this section in those instances in which the nature of the functions, size or complexity of the unit involved are such that the board may approve such an addition or additions on petition of the department head approved by the commissioner;

(i) Division directors subject to the provisions of KRS 18A.170. Division directors in the classified service as of January 1, 1980, shall remain in the classified service;

(j) Physicians employed as such;

(k) One (1) private secretary for each person exempted under subsection (1)(e), (g) and (h) of this section;

(l) The judicial department, referees, receivers, jurors, and notaries public;

(m) Officers and members of the staffs of state universities and colleges and student employes of such institutions; officers and employes of the teachers' retirement system; and officers, teachers, and employes of local boards of education;

(n) Patients or inmates employed in state institutions;

(o) Persons employed in a professional or scientific capacity to make or conduct a temporary or special inquiry, investigation, or examination on behalf of the general assembly, or a committee thereof, or by authority of the governor, and persons employed by state agencies for a specified, limited period to provide professional, technical, scientific, or artistic services under the provisions of KRS 45.700 to 45.720;

(p) Seasonal, temporary, and emergency employes;

(q) Federally funded time-limited employes;

(r) Officers and members of the state militia;

(s) State police troopers and sworn officers in the department of state police, justice cabinet;

(t) University or college engineering students or other students employed part-time or part-year by the state through special personnel recruitment programs; provided that while so employed such aides shall be under contract to work full-time for the state after graduation for a period of time approved by the commissioner or shall be participants in the cooperative education program approved by the commissioner;

(u) Superintendents of state mental institutions, including heads of mental retardation centers, and penal and correctional institutions as referred to in KRS 196.180(2);

(v) Staff members of the Kentucky Historical Society, if they are hired in accordance with KRS 171.311;

(w) County and Commonwealth's attorneys and their respective appointees;

(x) Chief district engineers and the state highway engineer.

(2) Nothing in KRS 18A.005 to 18A.200 is intended, or shall be construed, to alter or amend the provisions of KRS 150.022 and 150.061.

(3) Nothing herein is intended or shall be construed to affect any non-management, nonpolicy-making position which must be included in the classified service as a prerequisite to the grant of federal funds to a state agency.

(4) Career employes within the classified service promoted to positions exempted from classified service shall,

upon termination of their employment in the exempted service, revert to a position in that class in the agency from which they were terminated, if a vacancy in that class exists. If no such vacancy exists, they shall be considered for employment in any vacant position for which they were qualified pursuant to KRS 18A.130 and 18A.135.

(5) Nothing herein shall be construed as precluding appointing officers from filling unclassified positions in the manner in which positions in the classified service are filled except as otherwise provided herein. (Enact. Acts 1982, ch.52, § 1, effective July 15, 1982; 1982, ch. 393, § 12, effective July 15, 1982; repealed, reenacted and amended by 1982, ch. 448, § 23, effective July 15, 1982; 1984, ch. 253, § 1, effective July 13, 1984; 1984, ch. 350, § 10, effective July 13, 1984; 1986, ch. 494, § 18, effective July 15, 1986.)

* * * * * * * *

18A.170. Certification of division directors who do not make policy.—It is further provided that the responsible departmental, board, commission or agency head shall at the time as which he elects to come under the provisions of KRS 18A.005 to 18A.200, certify to the board the positions of those division directors or heads under their jurisdiction whose duties are nonpolicy making together with a sufficient statement of their duties to enable the board to determine whether or not, as a matter of fact, such duties are nonpolicy making in their nature. He shall, at any time subsequent to coming under the provisions of KRS 18A.005 to 18A.200 certify to the board additional division directors or heads whose duties are nonpolicy making. At the time of certification notice thereof shall be given to the interested division director or head in the form of a copy of the statement certifying the duties of his office. The board may conduct such hearings as it may deem necessary, and shall conduct hearings pursuant to the administrative provisions of KRS 18A.095 in the event

of a difference of opinion between the certifying officer and the interested division director or head, before entering its findings of fact and an order either classifying or denying classification to such position. Either the certifying officer or the division director or head may appeal the findings of fact and the final order of the board by initiating action in the Franklin Circuit Court pursuant to the provisions of KRS 418.040 et seq. (Repealed, reenact. and amend. 1982, ch. 448, § 34, effective July 15, 1982.)